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DECISIONS
OF THE
SUPREME COURT, VICE-ADMIRALTY COURT
AND
BANKRUPTCY COURT
OF
MAURITIUS.

1886

PART I

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EDITED BY

ANATOLE SAUZIER

ADVOCATE

AND

ARTHUR THIBAUD

CROWN-SOLICITOR

MAURITIUS :

GENERAL STEAM PRINTING COMPANY, 6, GOVERNMENT STREET

1887



JUDGMENTS OF THE SUPREME AND OTHER COURTS OF MAURITIUS

EDITED BY

ANATOLE SAUZIER

ADVOCATE

AND

A. THIBAUD

CROWN SOLICITOR

EDMOND SOLESSE
AVOUE
PORT-LOUIS

1886

SUPREME COURT

**ACTION BY PRINCIPAL AGAINST AGENT —
RENT AND SALE PRICE CLAIMED FROM
AGENT—PLEA OF RESPONSIBILITY INCUR-
RED TOWARDS THIRD PARTIES IN OTHER
SALES BY AGENT—SUMS CLAIMED RETAIN-
ED TO MEET THE RESPONSIBILITY—AGENT
WENT BEYOND MANDATE — VALIDITY OF
SALES NOT RECOGNISED BY COURT—PLEA
OVERRULED WITH COSTS.**

Plaintiff claimed from Defendant, her agent in Mauritius, certain sums received by him for rent and also as purchase price of certain lands sold by her previous to her leaving the island.

Defendant acknowledged having received the sums claimed, plus certain other sums for

lands of plaintiff sold by him during his agency. He urged, however, that as his right of selling these last lands had been denied, and as he was exposed to be sued in damages by the purchasers, he was entitled to retain all the money claimed, or to pay it in the Registry, to meet the above actions in damages.

The Court overruled the plea, in as much as Defendant having gone beyond his mandate by selling with guarantee lands he had been instructed to sell without guarantee and without restitution of price in case of eviction, the sales were not binding upon his principal.

Defendant was, therefore, condemned to pay the sums claimed in the declaration, with costs of suit.

WIDOW PASTOUREL,—Plaintiff

versus

T. PITOT,—Defendant.

—
Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor E. DIDIER ST.-AMAND,—Acting
Puisne Judge.

—
E. GALLET,—Counsel for plaintiff

E. GANACHAUD,—Attorney for the same

L. ROUILLARD,—Counsel for defendant

P. F. LASTELLE,—Attorney for the same.

—
Record No. 22,877.

10th February 1886.

—
In this case, plaintiff Mrs. Widow Pastourel claims certain sums of money which she alleges defendant Mr. Thomy Pitot, acting as her agent has received for her and refuses to pay; Mr. Thomy Pitot admits having received the sum of Rupees 5,683.95 c. which is more than the amount claimed and which consists of:

10. Rent collected.

20. Money paid for sales of land at Curepipe made by Mrs. Widow Pastourel before her departure for Europe.

30. Proceeds of different sales or promises of sale made by Mr. Thomy Pitot, acting as agent of Mrs. Widow Pastourel.

The figures of the account put in evidence by defendant are not questioned, Mr. Pitot,

however, declines to pay any of the items above referred to on the plea that his right of selling the land of Mrs. Pastourel having been denied, he is exposed to law suits, and is therefore entitled to keep in his hands or deposit in the registry, if so ordered by the Court, whatever sums he may owe to plaintiff to meet the damages claimed of him and which are likely to exceed the amount due by him.

We cannot support this pretention which is not based upon any of the facts laid before the Court in this case and we hold that Mr. Pitot as agent of Mrs. Widow Pastourel is bound to pay to her the sums which he has received for her in virtue of the mandate given to him.

With regard to the sales which Mr. Pitot made after Mrs. Pastourel had gone to Europe, we have to examine whether in making them Mr. Pitot has acted within his power of attorney or exceeded his instructions.

It results from the examination of Mr. T. Pitot and the letters in evidence that when Mrs. Pastourel first arrived in Europe she used to send her instructions to Mr. Pitot through her son-in-law, Mr. Poulin, who writes under date 4th January 1883.—
“ Sell without guarantee or restitution of price in case of eviction in the same terms as the sales to “ Sobha ” and “ Gros Yeux ” and again on the 18th February 1883, “ Mrs. Pastourel reckons upon you to receive what is due by Sobha and Gros Yeux and to sell the rest of her land always under the same conditions as to guarantee.”

These were the clear instructions under which Mr. Pitot was to act, when on the 4th of June 1883, Mrs. Widow Pastourel informed him that “ for the future she will communicate directly with him so as to relieve Mr. Poulin from the annoyance of attending to her affairs ”—and on the 5th of July she writes to Mr. Pitot again requesting him to

"find" a buyer for her land at Curepipe.— In this letter however, plaintiff in no way cancels the original instructions given through her son-in-law, she is still willing to sell her land at Curepipe but does not express directly or indirectly any intention of varying the mode and conditions of sale. We consider therefore that Mr. Pitot was bound to sell the land according to the instructions of his "mandant" under the same conditions imposed upon Sobha and Gros Yeux that is "without guarantee or restitution of price in case of eviction." In not adhering to his instructions, Mr. T. Pitot has exceeded the powers entrusted to him and thereby rendered himself personally liable for the acts done by him contrary to his instructions.

For the above reasons we order defendant to pay to plaintiff the rent collected by him, and also the money which he has received from those who bought land from Mrs. Pastourel before her departure from Mauritius together with interest on those respective sums from the date of the "mise en demeure." With regard to the sums received by Mr. T. Pitot for the sales made by him after Mrs. Pastourel's departure, the Court having decided that he had acted contrary to the instructions sent to him from France, it is clear that Mrs. Widow Pastourel or her heiress, who besides does not claim them in her demand, is not entitled to receive them.

Costs to be paid by defendant.

SUPREME COURT

SALE BY AN AGENT WHO HAD EXCEEDED HIS MANDATE CANCELLED—THE AGENT TO RETURN THE SALE PRICE, WITH INTEREST THEREON, AND PAY THE COSTS OF THE

UNEXECUTED DEED OF SALE, AND COSTS OF SUIT—PART OF THE PRINCIPAL'S COSTS TO BE ALSO SUPPORTED BY THE AGENT.

In conformity with the decision in the preceding case, the agent who had unduly sold a piece of land was condemned to return to the purchaser, the plaintiff in this case, the sale price, together with the costs of the deed of sale which had remained unexecuted, and interest on the price paid in his hands.

The Agent was also condemned to pay part of the costs of his principal who had been made a party to this suit.

WIDOW SHEIK CASSIM, — Plaintiff

versus

WIDOW PASTOUREL & ANOR, — Defendants

Before

His Honor E. J. LECLEZIO, — Chief Judge

and

His Honor E. DIDIER ST AMAND, — Acting
Puisne Judge.

V. KIVERN, — Counsel for Plaintiff

A. DESVEAUX, — Attorney for the same

E. GALLET, }
L. ROUILLARD, } Counsel for Defendants

E. GANACHAUD, }
P. F. LASTELLE, } Attorneys for the same

Record No. 23036.

10th February 1886.

The Court having decided in the case of Pastourel versus Pitot, that Mr. Th. Pitot had exceeded the powers entrusted to him by Mrs. Widow Pastourel, it results that Mr. T,

Pitot is bound to refund to Mrs. Widow Sheik ~~the~~ the sale price which she paid to him, together with the expenses which she had to incur for the deed of sale which was never signed and also the cost price of the survey which was made of the land in contemplation of the intended sale. The only damages proved consist in the loss of interest on the price paid and we consider that such interests are due to plaintiff.

For the above reasons we give Judgment in favor of plaintiff against Mr. T. Pitot with costs.

With regard to Mrs. Widow Pastourel's costs, we are of opinion that she is entitled to recover them from Mr. T. Pitot from the date on which she authorized him to reimburse the amount paid by plaintiff.

SUPREME COURT.

FAMILY COUNCIL OF FRIENDS,—BROTHER APPOINTED GUARDIAN TO MINOR BROTHERS, ORPHANS OF IMMIGRANT—ART. 19 LABOR LAW,—MEANING OF "RELATIVES" IN THAT ARTICLE,—PROCEDURE OF CIVIL CODE TO BE ADOPTED,—RELATIVES DO NOT INCLUDE FRIENDS,—PROTECTOR OF IMMIGRANTS ORDERED TO CONTINUE AS GUARDIAN TO ABOVE MINORS.

A family Council composed of a brother of age and of five friends appointed the former guardian of his minors brothers, orphans of an Immigrant.

On a motion to the effect that the Protector of Immigrants should be divested of the guardianship of these minors, the Court held :

10. That Art. 19 of the Labour Law spoke of a family Council composed of relatives, not of friends.

20. That it would be neither legal nor expedient to extend the meaning of the word relatives thus found in a special law, framed for a certain class of people, so as to include friends in it.

30. That when the article speaks of a family council to be held in conformity with the requirements of the Civil Code, it simply means that the procedure to be adopted is that traced out by the Code.

The application was refused, and the Protector of Immigrants was ordered to continue to act as guardian of the minors.

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor E. DIDIER ST AMAND,—Acting
Puisne Judge.

EX PARTE :

PADARUTH

V. KIVERN,—Counsel for plaintiff,
M. LEBLANC,—Attorney for the same.

The Substitute Procureur general-ministère
public.

Record No. 23861.

10th February 1886.

His Honor the Chief Judge :

This is a motion which was made in order to obtain from the Court a rule ordering that the Protector of Immigrants should be divested of the guardianship of certain minors, the brother of those minors having become of age and having caused a family council to be

held before the District Court of Grand Port and that family Council having appointed the brother of age as the guardian of those minors.

The Protector submitted to the Court that in virtue of Article 19 of Ordinance 12 of 1878 he is "the guardian ex officio to all immigrants who are minors and whose parents cannot be found, and all orphans of immigrants whether such orphans are born in this Colony or elsewhere, if such orphans or minors have no relatives in the Colony competent to form a family Council for them, in conformity with the requirements of the Civil Code."

It appears from the family Council before us that it was composed of that brother, who has been appointed guardian and of five friends of the minors, and it was urged that by the words "relatives" which we find in article 19 of the law, it is meant that in default of relatives in the Island, friends might form a family Council, and that opinion was expressed to us on account of the following words which are contained in the article: "that the family council shall be held in conformity with the requirements of the Civil Code."

We have considered carefully the provisions of the Ordinance and we have come to this conclusion: that we cannot extend the meaning of the word "relatives" which is contained in the article. We think that this is a special provision contained in a special law, the labor law, and that we would not be entitled on account of the words "in conformity with the requirements of the Civil Code" to hold that the legislature meant by the word "relatives" that, in default of relatives, friends might be called. We think that what is meant by the words "in conformity with the requirements of the Civil Code" is simply this; that in order to hold that family

Council there should be the same number of relatives as is required by the Civil Code and also that the same procedure should be followed as traced out by the Civil Code, but we cannot extend the meaning of the word "relatives" by including friends in it. In practice we are aware of the danger that sometimes occurs in ordinary cases of calling friends instead of relatives, and certainly having regard to the class of persons whom this law is intended to protect, we think it would be still more dangerous to allow friends to replace relatives, and we consider that the interests of the minors are much better safeguarded by the high official who is entrusted with the care and management of their affairs than if the guardianship were to be entrusted in some cases to mere friends. At all events apart from that consideration of expediency, we are of opinion that this being a special law we cannot extend the meaning of the word "relatives" so as to include in it the meaning of "friends."

We must therefore refuse the application which has been made in this case and order that the Protector of Immigrants shall continue in conformity with the law to be the guardian of the minors.

SUPREME COURT

SALE OF IMMOVABLE PROPERTIES.—PURCHASE PRICE NOT PAID.—MEMBERS OF THE PROFESSION AT MAHÉ CONCERNED WITH SALE.—AFFIDAVIT.—CONCURRENT JURISDICTION OF COURT OF SEYCHELLES AND SUPREME COURT. — "FOLLE ENCHÈRE" TO TAKE PLACE IN MAURITIUS.

The purchase price of certain properties situated at Seychelles not having been paid, it became necessary to resell them by way of folle enchère.

It was shown by an affidavit that all the members of the legal profession at Mahé were, some, fol-enchérisseurs themselves, and others, advisers of the fol-enchérisseurs, and that the present District Judge of Seychelles had been, while practising, counsel to one of the parties in several litigations connected with the said properties.

The Court, considering that it had concurrent jurisdiction with the District Court of Seychelles for all the matters coming within the latter Court's jurisdiction, held that, under these very exceptional circumstances, the sale by folle-enchère should take place in Mauritius, before the Master of the Supreme Court, after due warning to all the interested parties in the dependencies.

BERTIN & ors,—Plaintiffs,

versus

DUCHENNE & ors,—Defendants.

Before

His Honor E. J. LECLÉZIO,— Chief Judge

and

His Honor E. DIDIER ST.-AMAND,— Acting
Puisne Judge.

E. GALLET,—Counsel for Plaintiffs,

HENRY BERTIN,—Attorney for the same.

The Defendants not appearing (this being an *ex parte* motion.)

Record No. 23,868.

10th February 1886.

HIS HONOR THE CHIEF JUDGE :

This was a motion made to obtain a rule of the Court authorising the applicants of file in

the Master's office, copies of the "Cahier des Charges" of certain properties which were sold before the District Court of Seychelles, by licitation after the death of one Mr. Dupuy, in order that the sale by way of "Folle Enchère"—the sale of the immoveable properties against the purchasers thereof—be prosecuted before the Master in the ordinary course of law.

In support of that motion, we have an affidavit in which it is stated that, at the request of de Chermont and wife, certain of the universal legatees of the late Aristide Dupuy, a notary has been appointed by the Court, to draw up the deed of partition, the deed of partition has been homologated here there have been certain collocations made to the applicants before the Court and the parties upon whom the collocations were made, that is to say, Mr. L. Duchenne, notary at Seychelles, Mr. Carosin attorney at Seychelles, Mrs. Wilson wife of Mr. Wilson, barrister at law, practising at Seychelles, have received a "Commandement" (summons to pay and not yet complied with it.

It is also stated that "the other attorney at law, practising at Seychelles, Mr. Savy is the legal adviser of Mr. notary Duchenne whose counsel in the several litigations which arose in the liquidation of the said succession was Mr. Myles Brown, the present District Judge at Seychelles. That in order to enforce the payment of the several collocations on the sale prices aforesaid, the resale by "folle enchère" of the said property must be resorted to, and it is impossible, under the circumstances above set forth, to prosecute the same before the District Court of Seychelles, it is indispensable and expedient that the same should be proceeded with before the Master of this Court."

There is no doubt that the Court has concurrent jurisdiction with the District Court of Seychelles for all matters coming within its jurisdiction and that licitations of properties situate at Seychelles have taken place before the Master's Court. In ordinary circumstances however, we should not be disposed to grant an application of this kind, but on the facts which are made known to the Court by this affidavit, we consider it is expedient that the "folle enchère" of the properties in question should take place before the Master of the Supreme Court. We therefore grant the motion, but at the same time we understand that necessary precautions will be taken in order that parties should be warned within a reasonable delay, so that they should not be taken by surprise by the proceedings instituted before the Master of this Court.

SUPREME COURT

CLAIM OF PAYMENT OF MUNICIPAL DEBENTURES OF £ 20 OR 100 DOLLARS, MAURITIUS CURRENCY, EACH—PAYMENT IN PARIS IN STERLING MONEY, OR IN MAURITIUS IN RUPEE CURRENCY, WITH EXCHANGE AND INTEREST.—CREDITOR CARRYING BUSINESS IN PORT-LOUIS.—DEBENTURES REGISTERED IN HIS NAME.—[INTEREST ALWAYS PAID IN THE ISLAND.—NOTICE OF PAYMENT ABROAD ONLY AFTER MATURITY.—DEFENDANT'S PLEA THAT DEBT MAY BE DISCHARGED AT THE DOMICILE OF CREDITOR AT MATURITY.

JUDGMENT—CASE TO BE DISTINGUISHED FROM FRANCO-EGYPTIAN BANK *versus* MUNICIPALITY—ART. 1248 CIVIL CODE—PAYMENT TO BE MADE AT PLACE MENTIONED IN CONVENTION AND AT TIME OF MATURITY—PAYMENT AT MATURITY POSSIBLE IN THIS CASE

AT PORT LOUIS ONLY AS NO NOTICE OF AN OTHER PLACE HAD BEEN GIVEN—ACTION DISMISSED.

The plaintiff, owner of six Debentures of the Municipality of Port-Louis of £ 20 or 100 dollars, Mauritius Currency, claimed to be paid either in Paris in sterling money, or in Mauritius in Mauritius Currency, with the exchange on Paris, together with interest from the 1st of August, date of maturity of the Debentures.

The debentures bore that they were payable at Port-Louis or in London, or Paris; all payments required abroad to be notified to the Town Treasurer four months previous to the date of maturity.

The defendant pleaded—inter alia—"that according to the fair and reasonable construction of the contract and according to law, they have a right to pay to the bearer at his actual domicile at the date of maturity, if at that date the bearer has not elected to be paid elsewhere."

It was admitted on both sides:

- 10. That the Company carried its business in Mauritius, and that since August 1876, it had obtained registration of the debentures in its name in the books of the Municipal Corporation.*
- 20. That interest on the said debentures had always been paid to the Company in Port Louis up to 1st August 1884.*
- 30. That notice that payment was required in Paris was not given within the delay fixed but after the debentures had become due.*

Held by the Court:

- 10. That the facts of the present case distinguish it from that of the Franco-Egyptian Bank v. Municipality of Port Louis (Supreme Court Reports, 1882, page 124),*

2o. *That under Art. 1247, Civil Code : " Le paiement doit être fait au lieu désigné par la convention."*

3o. *That if by the contract, the creditor has the right of claiming payment abroad, that right was subject to his giving notice of his desire, and that there is nothing in the Debenture to take away or modify the right which a debtor has of discharging his debt after it has become due:*

4o. *That in this case, that right could be exercised in one way only : by offering payment to the owner of the debentures, who were actually in Port Louis and who had not expressed a wish to be paid elsewhere.*

The defendant's plea was therefore sustained, and the declaration dismissed with costs.

THE COLONIAL FIRE INSURANCE
COMPANY,—Plaintiffs,

versus

THE MUNICIPALITY,—Defendants.

Before

His Honor L. Cox,—Puisne Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—
Puisne Judge

P. L. CHASTELLIER,—Counsel for Plaintiffs,
A. J. COLIN,—Attorney for the same,

E. BAZIRE & G. GUIBERT,—Counsel for
Defendants,

E. LAURENT,—Attorney for the same.

Record No. 22683.

5th March 1886.

The Plaintiffs in this case claim from the defendants payment of six debentures of the amount of £ 20 or \$ 100, Mauritius Curren-

cy each, issued by the Corporation on 1st August 1886 stipulated to be payable in Port Louis, London or Paris in 18 years i. e. on 1st August 1884.

The declaration avers that on 21st August 1884 the managers of the Company gave notice to the Corporation that payment in Paris was required and that on 21st September following by a letter from the Town Clerk they were informed that the Corporation refused to pay the defendants in Paris as required, and judgment of the Court is prayed for " 1o. decreeing that the Company is " entitled to receive payment in Paris. 2o. " ordering the defendants to pay the sum of " \$ 600 or £ 120 amount of the said debentures in Paris or in Port Louis with the " exchange on Paris together with interest " from 1st August.

The defendants plead: 1o. " that they " were ready at the date of maturity of the " debentures and are ready, to pay the " plaintiffs, in Port Louis the amount of " those debentures in legal Mauritius Currency 2o. that the plaintiffs are not entitled " to claim payment at Paris because: " 1o. " the right of the bearer of such debentures " to claim payment in Paris, depends upon a " condition' to wit: a notification to the " town treasurer of all payments required in " Paris four months before the date of maturity, and, that condition not having been " fulfilled by the plaintiffs, the right to claim " payment in Paris, does not arise—2o. because according to the only fair and reasonable construction that can be put on the " contract the right to claim payment in " Paris or London accrues only to the bearer " who is at the maturity of the debentures in " Paris or London, and not to one whose domicile and residence at the date of maturity " are in Mauritius; and the said plaintiffs

"were at the time of maturity and are still
 "domiciled and residing in Port Louis, where
 "the debentures were at the date of maturity
 "—30. because, at all events, according to the
 "only fair and reasonable construction of the
 "contract, and according to law, the defend-
 "ants have a right to pay to the bearer at his
 "actual domicile, at the date of matu-
 "rity, if that bearer has not previous to
 "maturity elected to be paid elsewhere—and
 "the plaintiffs were at the time of maturity
 "of the debentures domiciled and are still
 "actually domiciled in Port Louis and had
 "not previously to the maturity of the said
 "debentures elected to be paid abroad."—
 and the defendants further say. "that the
 "money belonging to the Plaintiffs is at their
 "disposal with the town treasurer and they
 "pray that "the action be dismissed."

The debentures in question are in the fol-
 lowing form.

"The Municipal Corporation of Port Louis
 "engage to reimburse to bearer as stated
 "below, the sum of twenty pounds sterling
 "or one hundred dollars Mauritius Currency,
 "the said sum bearing interest at (9 o/o) nine
 "per cent per annum payable every three
 "months at Port Louis, or every six months
 "in London or Paris through the Bankers of
 "the Corporation." Then follows a note as
 to the time and mode of reimbursement.

10. The above debenture of twenty pounds
 "or one hundred dollars is payable in
 "eighteen years from the date of issue at
 "Port Louis, or in London or Paris through
 "the Bankers of the Corporation, all pay-
 "ments required abroad to be notified to
 "the town treasurer four months previous
 "to the date of maturity.

20. The Bankers of the Corporation "are
 "at present the Oriental Bank Corporation

"of London whose agent in Paris is Monsieur
 "P. Gil, of Paris, Banker. Notice of any
 "change in this respect will be given in the
 "news papers of Port Louis."

30. "The above debenture may be regis-
 "tered in the name of the bearer thereof on
 "application being made to the Town clerk
 "of Port Louis, in terms of a decision of the
 "Municipal Council under date 19th Decem-
 "ber 1862."

The defendants contend that the clause
 "all payments required abroad to be notified
 "&c." contains a condition which the bearer
 of the debentures" must comply with, under
 penalty of losing the right of claiming pay-
 ment in London or Paris, and as the notice
 here was not given within the delay fixed
 but after the debentures had become due, it
 is urged that the right of claiming payment
 in Paris has been lost by the plaintiff and as
 a consequence that the defendants can law-
 fully pay the debt in Port Louis.

The plaintiffs rested their case on the deci-
 sion of this Court in *Franco Egyptian Bank*
vs. The Municipality of Port Louis (Reports
 of 1882 p. 124) in which it was held that fai-
 lure by the bearer of similar debentures to
 give the notice at least four months before the
 date of maturity, does not entail forfeiture of
 the right of claiming payment abroad. The
 defendants denied the correctness of that deci-
 sion, and besides argued that this case is
 distinguishable from *Franco Egyptian Bank*
vs. The Municipality.

We will deal first with the last question
 raised i.e. whether this case can be distinguish-
 ed from the precedent relied upon by the
 plaintiffs.

In the action by the *Franco-Egyptian*
Bank, the question between the parties was
 submitted to the Court in the shape of a spe-

cial case in which the following facts were set forth, the debentures then claimed belonged to Auguste Louys who had transferred his rights to the Bank, the transfer being made in Paris, the date of maturity was in march 1881 and notice that payment required abroad was given by Auguste Louys by a registered letter dated Paris 24th may 1881, and the question for the decision of the Court was thus stated " whether the plaintiff has " forfeited the right to claim payment at Paris " for having failed to give notice to the " Town treasurer four months previous to " maturity, of his intention to claim payment " at Paris."

In other words whether " the clause inserted at the bottom of the debentures embodies " a condition the non-fulfilment of which four " months previous to maturity entails forfeiture of the right of being paid in Paris or " London" and it is agreed that " if the Court " is of opinion that the plaintiff has not forfeited the above right, then judgment shall be " entered for plaintiff for R. 22,000, with interest from 1st march 1881, plus the exchange on Paris and costs of suit. If the " Court is of opinion that the right has been " forfeited the defendants shall pay to plaintiff only R. 22,000 with interest from 1st " march 1881 and judgment will be entered " for the defendants for their costs."

In the case now before us the bearer of the debentures is a Company carrying on its business in Port Louis, which has availed itself of the right conferred in parag. 3rd of the clause at the foot of the debentures and has obtained registration of the debentures in its name since 18th August 1876. It is besides averred by the defendants and not denied, that interest on the debentures has been paid to the Company in Port Louis up to 1st August 1884 when the principal became due. It is clear therefore that we have in this case facts which did not arise in the case of Franco-

Egyptian Bank and we have besides to give judgment on the points raised on the pleas of the defendants, some of which were not raised, in fact could not be raised, by the Municipality in the previous case in which our judgment had to be confined to the questions raised in the special case.

The rule of law applicable to the case is that of article 1247 C. C. " Le paiement doit être exécuté dans le lieu " désigné par la Convention ". We must therefore ascertain at what place in the intention of the parties to this contract payment is to be effected when the debenture has been registered in the name of a particular owner who is domiciled in Port Louis and who has failed to give notice of his intention of claiming payment abroad when the debenture becomes due.

The contract clearly gives the creditor the right of claiming payment in Paris or London, but that is subject to his giving notice of his wish to be paid there. In other words the creditor may elect to be paid abroad, but he must notify that he has so elected—on the other hand there is nothing in the Debenture to take away or modify the right which a debtor has of discharging his debt after it has become due. Therefore it must be assumed that the parties intended that such a right would exist and could be exercised. But how could that right be exercised when the creditor not merely an unknown bearer, but known as being the registered owner of the debenture is domiciled in Port Louis at the date of maturity and has not elected to be paid abroad? It can be exercised in only one way: by offering payment to that owner in Port Louis, for if he has not notified his intention of being paid abroad, it is clearly impossible for the debtor to tender payment either in Paris or London to a person who is actually in Port Louis and who has not expressed the wish to be paid elsewhere.

We think the parties must be taken to have intended that in such a case the Municipality

would be entitled to pay at Port Louis, and we must sustain the defendant's plea "that according to the fair and reasonable construction of the contract and according to law, the defendants have a right to pay to the bearer at his actual domicile at the date of maturity if at that date the bearer has not elected to paid elsewhere."

Our conclusion will therefore be that the defendants' third plea is a good answer to the declaration which must accordingly be dismissed with costs.

SUPREME COURT

ACTION IN DAMAGES FOR VERBAL SLANDER—

SALE OF GOODS—CONVERSATION IN A RAILWAY CARRIAGE—PLAINTIFF REPRESENTED AS A SWINDLER BY DEFENDANT—TENDER OF MONEY FOR EXPENSES—APOLOGY BY DEFENDANT—NO SPECIAL DAMAGES—ENGLISH LAW TO BE CONSULTED AS "RATIO SCRIPTA"—CIVIL CODE TO GOVERN THE CASE—ART. 1382 AND FOLLOWING OF THE CIVIL CODE—MORAL DAMAGES SUFFICIENT TO RECOVER—A RAILWAY CARRIAGE A PUBLIC PLACE—APOLOGY NOT UNRESERVED—PLAINTIFF'S CONDUCT NOT ALTOGETHER SATISFACTORY—RS. 100 GRANTED AS DAMAGES—COSTS.

The defendant having sold certain articles of furniture to a party, claimed by error the value thereof from plaintiff, the brother of the purchaser.

Plaintiff having refused to pay, the defendant in the course of a conversation held aloud in a Railway carriage, stated that he (plaintiff) was the real purchaser and represented him to the persons present as a swindler.

After issue joined, defendant admitted his mistake apologised to plaintiff, and though denying his

liability in damages, paid into the Registry of the Supreme Court, Rs. 100 for the expenses incurred by plaintiff.

The Court held:

10. *That although the English Law may be consulted in similar cases as ratio scripta, we have in Mauritius, in the Civil Code, a statutory law which governs the case;*
30. *That a Railway carriage is a public place and that the conversation was carried on here in a sufficiently loud tone to allow the plaintiff's friends to hear it.*
40. *That the apology here not having been unreserved and the Rs. 100 having been tendered not for damages but for expenses, plaintiff was justified in proceeding with his suit.*
50. *But considering that there had been no actual damage and that the plaintiff's conduct had also been unsatisfactory, the Court condemned defendant to pay only Rs. 100 as damages, with costs of the action.*

L. BOUFFÉ,—Plaintiff,

versus

E. LE MAIRE,—Defendant.

Before

His Honor E. J. LECLÉZIO,—Chief Judge,

and

His Honor E. DIDIER ST.-AMAND,—Acting
Puisne Judge.

W. NEWTON,—Counsel for Plaintiff

E. HUTEAU,—Attorney for the same

Y. JOLLIVET,—Counsel defendant,

P. E. DE CHAZAL,—Attorney for the same.

Record No. 22,804.

12 March 1886.

The plaintiff who is a joint district clerk
sues the defendant who is a trader and mem-

ber of the firm Chevreau & Co, in damages for having maliciously exhibited him the plaintiff as a thief under the following circumstances.

It appears from the evidence laid before us that on the 29th April 1884 the defendant sold to one Mr. Léonce Bouffé for the sum of Rs 80.50 one bedstead, one spring mattress and one mattress which were sent to Union-Vale station and the price was to be paid within eight days.

The defendant stated that several weeks having elapsed without having heard from the purchaser, he sent his clerk Bohler to Mr. Adrien Bouffé to ask for the christian name of his brother who was at Grand Port and that the name of Lucien being given, it was then that he considered Lucien Bouffé the plaintiff, to be the debtor and wrote to him to claim the amount. This is corroborated by Bohler's evidence. The version of Mr. Adrien Bouffé is however very different, he says that Bohler went to him in the beginning of May to ask for the address of Léonce Bouffé which had already been given to the defendant by Léonce Bouffé himself when he purchased certain goods, the defendant having forgotten it, and that thereupon he Adrien Bouffé gave the address of Léonce Bouffé at Union-Vale station, Distillerie *Les Mares*. If this version be the true one it is rather strange that the defendant should have addressed his letters claiming payment of the account to Mr. Lucien Bouffé at Mahebourg.

The defendant says that the first letters written by him were not answered by the plaintiff, that the first answer which he obtained was to his registered letter of the 5th of September 1884, written after his clerk Bohler had seen the plaintiff in town; by that answer which is dated the 8th September the plaintiff declares that he never purchased any article whatever in Messrs. Chevreau's

stores; thereupon, on the 17th September the plaintiff receives a request from Mr. Attorney de Chazal's office to pay the amount as soon as possible; on the 22nd September the plaintiff writes to Mr. de Chazal that he does not owe the account claimed, on the 26th September the defendant writes to the plaintiff affirming that he is the purchaser of the articles and that he does not make any confusion between him and his brother Léonce Bouffé whom he knows well by sight. On the 15th October the defendant however writes to Mr. Léonce Bouffé to ask him whether he is the debtor of the account, this latter does not reply at first that he is, he writes on the 16th October that he will communicate with his brother Lucien and answer later; and on the 20th October he replies in a long letter that he is the purchaser of the articles and is ready to pay for them. Now the plaintiff avers that at the time, and after having taken cognizance of the letter addressed by the plaintiff to attorney de Chazal the defendant was informed by Mr. Floris Bouffé, plaintiff's father, to whose office the defendant had gone, that the articles must have been purchased by Léonce Bouffé and that notwithstanding such information and the denials of the plaintiff the defendant did maliciously and wickedly on or about the 23rd September publicly, to wit: in a railway compartment, hold the following conversation:— "connaissez-vous " M. Lucien Bouffé? Il a acheté à mon magasin des articles et m'a dit de les adresser " à son frère, M. Léonce Bouffé aux Mares; " je lui ai envoyé mon compte, il n'y a fait " aucune réponse; je lui ai écrit plusieurs " lettres et n'ai pas eu de réponse aux premières. Quand il me fit une réponse " c'était pour me dire qu'il n'avait jamais mis " les pieds à mon magasin.— M. Bouffé est " dans la basoche, il savait parfaitement " qu'il n'y avait pas d'évidence orale au-dessus d'une certaine somme; c'est un acte

“ de brigandage, c'est un vol à main armée,
“ je ne puis pas le poursuivre comme voleur
“ devant les tribunaux, mais je le dénoncerai
“ publiquement, c'est un voleur ; ce n'est pas
“ Monsieur Léonce Bouffé, c'est Monsieur
“ Lucien Bouffé, je le connais parfaitement.”

The Plaintiff further avers that by his letter of the 13th October to Léonce Bouffé, the defendant represented him the plaintiff to his brother as a dishonest person and demands of the Court to condemn the defendant to pay a sum of Rs. 2,500 as damages.

The defendant says in his plea that it was through an error into which he was led by the information which he received from his clerk and into which he was confirmed by the attitude taken by the plaintiff and his brother Léonce Bouffé, he the defendant firmly believed that the party who had come to the shop Chevreau & Co. and purchased the furniture was the plaintiff, that the plaintiff and his brother confirmed him in this belief through their not having answered five letters addressed to them and especially the plaintiff by not informing the defendant that it was his brother Léonce Bouffé who had purchased the furniture, as the fact was well known to plaintiff — that after the service of the declaration upon him the defendant having been told by Mr Notary Guimbeau, that the purchaser of the furniture was Mr Léonce Bouffé, at once stated to several persons with whom he was talking on the 23rd. September 1884, his regret of having used towards plaintiff the expressions in plaintiff's declaration mentioned, that the words for which the present action is entered were uttered at all events in a private conversation and were never meant to be and were not publicly spoken, that at all events these expressions were uttered under the influence of the indignation under which defendant was then labouring at the thought of having been deceived; that the defendant considers it his duty to apologize and does hereby apologize

for the words used by him towards plaintiff and states his regret at having used the same under the influence of an error, that the defendant authorizes plaintiff to shew such apology to any person who might have heard the words reproached to him by plaintiff, that the defendant did never bear any grudge or malice or had any hatred or contempt towards plaintiff, but that the expressions used by him were caused by excitement, and defendant having at once and as soon as he became aware of the error under which he was labouring expressed his regret and withdrawn the words spoken by him, he is not liable in damages, that defendant is ready to pay plaintiff's costs up to the day of service of plea and also R. 100 for the expenses which plaintiff might have incurred.

The plaintiff replied that the error under which defendant alleges he laboured constitutes no justification of the act complained of, in as much as he was informed before the committing by him of the offence laid to his charge of the real purchaser of the articles, and had defendant applied to Léonce Bouffé he should have acknowledged himself to be the purchaser and debtor and paid the same and the plaintiff declines to accept the tender of Rs 100 made for expenses.

There can be no doubt from the evidence laid before us and from the admission of the defendant himself that he spoke the words upon which this action is based and that they were uttered in a railway compartment which in our opinion is a public place. The defendant stated that it was in a private conversation, but it appears that the conversation took place in a loud tone of voice, so that friends of the plaintiff who were in the same compartment could hear distinctly what the defendant said : If passengers in a railway carriage choose to have private conversations prejudicial to the character of persons whose acts are commented upon in such a tone of voice that their neighbours can easily hear

what they are saying they must bear the consequences. We must therefore hold that what the defendant said on that occasion was equivalent to public slander. The defendant pleaded that he did not act with bad faith but that he was labouring under an error and was excited. After the examination of the witnesses and an attentive reading of the correspondence between parties we are satisfied that the circumstances which preceded and accompanied the incriminated act show that the defendant was of good faith, and that he was really under the influence of an error, but at the same time we cannot consider his good faith and error as a complete justification for his conduct, he persisted in spite of the denial of the plaintiff to treat him as his debtor, after the denial of the plaintiff it was for the defendant to enquire and not assume that the plaintiff was a swindler; it would appear from the defendant's evidence that it was only after he had uttered the words complained of that he went to see Mr Bouffé the father who told him that the purchaser might be his other son Léonce Bouffé, however this latter must have already been mentioned to defendant as the possible purchaser before the incriminated words were spoken because we find that the defendant alludes to Léonce Bouffé in the railway carriage and he there maintains that Lucien and not Léonce was the real purchaser, we must therefore find the defendant at fault for having neglected to ascertain which of the two brothers was the real purchaser before he accused the plaintiff with having committed a dishonest act.

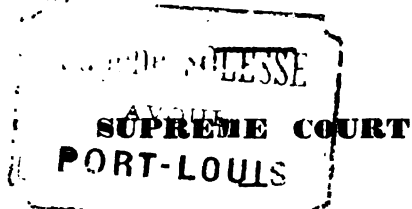
On the other hand we cannot say that we are satisfied with the attitude taken by the plaintiff from the outset; when he is written to at first, he does not answer; when the defendant's clerk claims payment of his account, he sends him away with a brutal answer and when he receives a registered letter he threatens the defendant with an action in damages

and warns him that he will not accept any excuse even if he were to acknowledge his errors afterwards. The plaintiff's brother Léonce Bouffé himself, when the defendant writes to him on the 13th October instead of immediately acknowledging his debt and telling the defendant that he has been labouring under an error, writes that he wants to communicate with his brother; and it is only on the 20th October that he writes to say he is ready to pay an account for which a few days credit had been given on the 29th of April. It is very possible that the plaintiff did not know that his brother Léonce had purchased the articles claimed, but his silence at first when written to and his rudeness afterwards must have contributed to a certain extent to maintain the defendant under the influence of his error, although those circumstances are not sufficient, as we have already stated, to excuse the public slander for which he is sued. No special damage was proved here and it was argued for the defendant that we should follow the jurisprudence of the English Courts in matters of oral slander when there is no special damage proved and dismiss the action. We do not think that in this matter we should follow the law laid down by the English Courts when we have a statutory law, article 1382 and fol. of the Civil Code which govern the case, although the English jurisprudence may be consulted in similar cases as a sort of *ratio scripta*. According to our laws, it is sufficient to prove a moral prejudice in order that there should be a verdict in favor of the plaintiff and here moral prejudice is naturally inferred from the words spoken and the place where they were uttered.

With regard to the apology made in the plea we cannot consider it as a full unreserved apology having been made after certain pleas in which a justification is attempted, and liability to damages having been denied by the defendant the plaintiff was justified in law in continuing the action. Besides the tender of Rs 100 was not made for damages

but for *expenses* and that sum was deposited in the Registry many months after issue had been joined.

Upon the whole we find that the defendant has committed an imprudent act which has rendered him liable to pay damages; but while protecting persons whose character is unjustly attacked, the Court will, in assessing the damages, take into consideration the circumstances of the case, and we are of opinion that on account of the attitude of the plaintiff, of the absence of special damage and of the apology which the defendant afterwards made, the plaintiff is not entitled to receive from the defendant more than Rs 100 as damages, which the defendant is hereby condemned to pay to the plaintiff together with the costs of this suit.



CLAIM OF A CASE OF GOODS SHIPPED FOR MADAGASCAR — PRELIMINARY PLEAS OF DEFENDANTS — SUPREME COURT HAS NO JURISDICTION — PLAINTIFF AN ALIEN — DEFENDANTS DOMICILED ABROAD — SERVICE OF PROCESS BAD — DEFENDANTS SHOULD NOT BE SUED PERSONALLY — PRELIMINARY PLEAS OVERRULED — ACTION A TRANSITORY ONE — COURT HAS SAME JURISDICTION AS QUEEN'S BENCH — SERVICE MADE ON MANAGING MEMBER OF FIRM GOOD SERVICE ON THE FIRM — THIRD PLEA SHOULD BE IN SHAPE OF DEMURRER — PLEA DISPOSED OF — DEFENDANTS CHARGED WITH RECEIVING AND UNDULY RETAINING THE GOODS — CASE TO BE PROCEEDED WITH.

Plaintiff in this case claimed from defendants a case of goods shipped in Mauritius, and received and unduly kept by them in Madagascar, or payment of Rs. 800, value of the goods.

Defendants pleaded as preliminary pleas :

10. *That the Supreme Court of Mauritius had no jurisdiction, in as much as plaintiff was an alien and the defendants dwell in Madagascar.*
20. *That service of the declaration was bad, it having been made upon one of the defendants only, whose presence in this colony was but accidental.*
30. *That they were only the Agents of the Company who owned the ship on board of which the goods had been placed, and therefore could not be personally sued.*

The Court overruled the first plea, on the ground that this action was a transitory one, and, therefore, one which the Queen's Bench would entertain, though the plaintiff was an alien and the defendants were domiciled abroad.

It overruled the second, because the service having been made on the managing member of the firm, it was good service on the firm.

As to the third plea, the Court considered that it should have been put on the Record in the shape of a demurrer.

The Court, however, disposed of it at once, as the declaration averred that the goods belonging to the plaintiff had been received by the defendants personally who unduly kept and refused to return them.

The action was ordered to be proceeded with on its merits. Costs reserved.

FAKIR MOËDINE SAÏBOO,—Plaintiff,

versus

PROCTOR BROTHERS,—Defendants.

—
Before

His Honor E. J. LECLEZIO,—Chief Judge

and

His Honor L. COX,—Puisne Judge

W. NEWTON,—Counsel for plaintiff

H. BERTIN,—Attorney for the same

P. L. CHASTELLIER,— Counsel for defendant

G. A. RITTER,—Attorney for the same.

Record No. 23,173

12th March 1886.

In this case plaintiff Fakir Moëdine Saïboo of Port Louis, trader, sues 10. Proctor Brothers, a British firm carrying on trade in Madagascar 20. Samuel Proctor of Pavilion street, Port Louis, Merchant, the managing member of the firm Proctor Brothers and claims from defendants the restitution of a case of goods alleged to have been shipped for Madagascar per steamer "Argo" in 1882 and to have been received at "Tamatave" by the defendants who refuse to give it up. As an alternative the plaintiff claims Rs 800 value of the goods. The defendants have raised several preliminary pleas with which we have now to deal. It was first contended that the Court has no jurisdiction in the cause, because the plaintiff is an *alien* and the defendants are not domiciled in Mauritius. It is admitted by the plaintiff that he is an *alien*. By the Royal Order in Council of 1869 regulating the powers of the British Consul in Madagascar, this Court is given concurrent jurisdiction with the Consul over suits arising in that Island between British subjects. It is clear that this provision does not apply here, and that the special jurisdiction given us by it cannot be exercised. But it is contended for the plaintiff that apart from special legislation and on general principles, the Supreme Court, as the Court of Queen's Bench has jurisdiction. We think this view must be supported. The Royal Order in Council of 1851 gives this Court full and original jurisdiction to hear, conduct, determine and pass decisions in all civil suits, actions, causes and any matters that may be brought and may be depending before the Supreme Court &c and section 2 besides in-

vests the Court with all the powers, authority and jurisdiction of the Court of Queen's Bench in England. The jurisdiction thus vested is not limited or restricted to cases between British subjects or to cases where both plaintiff and defendant are domiciled in the Colony, nor has the defendant's Counsel quoted any authority to show that the jurisdiction of the Court of Queen's Bench in England is similarly restricted.

On the other hand the plaintiff's Counsel has quoted Lush page 1 which shows that the Superior Courts of law have jurisdiction over all causes of action of a *transitory nature* whether they may have arisen within the realm or abroad, or whether between subjects or aliens. It was suggested for the defendants that the cause of action here is not *transitory* but of a *local nature*, in which case the rule above referred to does not apply. But another passage of the same work Book I Chapter 2 page 276 shows that *transitory* actions comprise actions for breaches of contract, personal wrongs and injuries to personal property, while the term *local* actions is restricted to actions for injuries to or in respect of real property. It appears therefore clear to us that the action in this case, which has reference to the wrong detention of personal property is of the class to which the rule quoted by Lush applies. It is one which the Court of Queen's Bench in England could have power to try and therefore we must have jurisdiction to try it; the plea to our jurisdiction must accordingly be overruled. The next preliminary plea "is that the firm Proctor Brothers which is domiciled in Madagascar cannot be properly and lawfully sued in Mauritius as a firm, and further by means of the service of the process upon Samuel Proctor whose presence in this Colony is but accidental." The first "part of this plea" that the firm is domiciled in Madagascar and cannot be sued here raises the question of our jurisdiction to try the cause

which we have just disposed of. The second part of the plea challenges the validity of the service of process on Samuel Proctor in Mauritius. We think it clear that the service made personally on the managing member of a firm is good service on the firm, article 59 of the Code of Civil Procedure which was referred to by the defendant's Counsel is not applicable. This second plea must therefore be overruled. After the preliminary pleas, the defendants also pleaded "that the plaintiff has no right, title or capacity to sue the present action." In support of this contention it was argued that "as the case of goods referred to in the declaration is stated to have been on board the steamer "Argo" which did not belong to the defendants, but to a Company of which they were the agents in Madagascar, no action could be against them personally".

It must be noticed in the first place that this plea in reality amounts to a demurrer to the declaration. It should therefore have been put on the record in the shape of a demurrer and the defendants should have obtained leave to demur and plead at the same time. Even, therefore, if the defendant's contention that for the causes stated in the declaration they are not liable personally appeared to us to be well founded, we could not in the shape of the record dismiss this action, but the plaintiff would be entitled to lay the whole of his case before us before we decided on the defendant's pleas that they are not liable. But we think the contention may at once be disposed of, the declaration avers that goods belonging to the plaintiff have been received by the defendants who refuse to return them. If these averments are proved, the plaintiff has a good cause of action against the defendants. We must therefore overrule this plea also. Costs reserved.

SUPREME COURT

CASE REFERRED TO MASTER TO COMPUTE ACCOUNTS.—MASTER HEARS ORAL EVIDENCE.—APPLICATION TO SUPREME COURT FOR A WRIT OF PROHIBITION.—JUDGMENT OF COURT.—MASTER ACTS BY DELEGATION EXPRESS OR IMPLIED.—PAR. 4 OF ORDER IN COUNCIL CONTAINS IMPLIED DELEGATION.—MASTER'S COURT A BRANCH OF THE SUPREME COURT.—ESTABLISHED CUSTOM OF THE MASTER'S COURT TO DEAL WITH ALL LEGAL INCIDENTS ARISING IN CASES REFERRED.—LEGALITY OF MASTER'S PROCEEDINGS SHOULD BE QUESTIONED BY EXCEPTIONS TO THE REPORT AND NOT BY PARTIAL AND SUCCESSIVE APPEALS OR BY WRITS OF PROHIBITION.—THESE LAST WRITS ADDRESSED ONLY TO COURTS OF INFERIOR JURISDICTION AND INDEPENDENT OF THE SUPREME COURT.—THE MASTER'S COURT ESSENTIALLY DEPENDENT UPON THE SUPREME COURT.—APPLICATION FOR WRIT REFUSED.—COSTS AGAINST APPLICANTS.

A case had been referred to the Master of the Supreme Court for computation of accounts and the order of reference contained no special direction as to the admission of evidence or hearing of witnesses.

Upon the Master admitting parol evidence in connection with the account, an application was made to the Supreme Court for a Writ of Prohibition on the ground that he was not a judicial functionary quâ Master, that he was to act in a judicial capacity only when specially commissioned to do so by the Judges, or authorized so to act by a local Ordinance, and that in these latter cases, his judicial powers are strictly limited to the terms of that act or of the reference and that he is not empowered to deal with incidental matters involving decisions upon special points of law.

Held by the Court of Appeal :

10. *That the Master acts always by delegation from the Supreme Court express or implied ; implied, when acting under the general exercise of the functions specified in par. 4 of the Order in Council ; and express, under an immediate reference or delegation from the Judges or from the Court.*

20. *That for these purposes, the Master's Court is a branch of the Supreme Court, which can only co-exist with the Supreme Court of the Colony and cannot act independently of it.*

30. *That in para. 4 of the Order in Council, there exists an implied delegation which, under ordinary circumstances, may be held to render express delegation unnecessary, and that the established custom of the Master has been to deal, in the first instance, with all legal incidents arising before him in the course of the proceedings.*

40. *That the only course consistent with economy both of the time and money, with public convenience and with that finis litum which is the interest of the common wealth, is that objections to the legality of the Master's proceedings should be taken by way of exceptions to the Master's report, and not by separate appeals on incidents arising, or by such applications as the one now before the Court.*

The Court declined to issue the writ prayed for, adding that even had it been established that the Master had exceeded his powers, the Writ of Prohibition which is addressed only to inferior Courts, independent of the Court of Issue, would not have been granted, the Master's Court being essentially dependent upon the Supreme Court.

Costs against the applicant.

DE LANUX,—Plaintiff,

versus

PIEERE BOYER DE LA GIRODAY,—
Defendant,

and

DE LANUX,—Plaintiff,

versus

F. B. DE LA GIRODAY,—Defendant.

—

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge

—

I. JOLLIVET & G. V. K[VERN],—Counsel for
plaintiff

H. THATCHER,—Attorney for the same

W. NEWTON & E. GALLET,—Counsel for
Defendants.

G. KÖNIG,—Attorney for the same.

—

Records No. 23,418, & 23,419.

31st March 1886.

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JUDGMENT:

This is an application for a writ of Prohibition addressed to the Master of the Supre-

me Court of this Colony against his admitting parol evidence in connection with an account between the parties which had been referred to him by the Court to take. The order of reference contained no special direction as to admission of evidence or hearing of witnesses.

An important question is involved as to the status of the Master, the nature of his functions and the extent of his discretionary powers. The argument upon the side of the applicant is that the Master is not to be considered a judicial functionary *quâ Master*, but that he is an officer of the Court to perform certain ministerial acts, and to act in a judicial capacity only when specially commissioned to do so by the Judges or authorized so to act by a local Ordinance, that, even in these latter cases, his judicial powers are strictly limited to the terms of that act or the reference and that he is not empowered to deal with incidental matters involving decisions upon special points of law. The status of Masters of English Courts at the date of the Order in Council constituting the Supreme Court of Mauritius was referred to in support of this view, and the local authority "*Cantin vs. Vincent George*" (1871) seemed to be greatly relied upon.

For the respondent, it was argued that the status of the Master of our Supreme Court is, and has always been different from that of Masters of the Courts of Law in England, that § 4 of the Order in Council of 1851 confers upon our Master statutory judicial authority in certain specified matters, in addition to those matters specially referred to the Master by the Judges; that the giving of a power implies the giving of all means necessary to its exercise, and that our practice since the date of the Order in Council has been that the Master in the exercise of his functions should

take judicial cognizance of all incidents arising in the course of proceedings in his Court.

There is no doubt that the original functions of the Master of this Court, as defined in the Order in Council of 1851, were much more extensive than the original functions of Masters of the higher Courts of Law in England. But it may be remarked that, if the analogy of English practice were to be followed here, the Master of our Supreme Court would occupy to day a higher position than is claimed for him by the respondents; for, since the Judicature Act of 1875, the English Masters now Masters of the Supreme Court of Judicature have enjoyed, subject to appeal to a judge, equal powers with those possessed by Judges in Chambers except in only one or two specified and excepted matters. We do not however, go quite so far as the learned Counsel for the respondent in his estimate of the judicial authority conferred on the Master of this Court by the terms of our own Order in Council. The order it was argued conferred on the Master a statutory jurisdiction apart from that which he derives from the Court or from the Judges. Our view rather is that the Master, who is an officer of this Court, acts always by delegation from the Court, express or implied. Implied, in the general exercise of the functions specified in § 4 of the Order in Council and express under an immediate reference or delegation from the Judges or from the Court. We regard the Master in short as an officer, to whom judicial powers are delegated by the Court to deal *generally* with the matters specified in § 4 of the Order in Council, and *specially* with such other matters as may be referred to him by the Judges. His Court for these purposes is a branch of our own, it can only co-exist with the Supreme Court of the Colony and cannot act independently of it

This view of the Master's functions and powers is not necessarily antagonistic to that of the judges in *Cantin versus Vincent Georges*.

That decision supported the *principle* of delegation, to which, we too, strictly adhere; but the Judges in that case seemed to be disposed to adopt the view that the delegation of judicial powers must be express rather than implied, while we see in § 4 of the Order in Council an implied delegation which, under ordinary circumstances may be held to render express delegation unnecessary — and as regards the practice of this branch Court, connected with and subordinate to our own there can be no doubt that the contention of the learned Counsel for the respondent is right, and that it has become an established custom of the Master to deal with all legal incidents arising before him in the course of proceedings, leaving it to parties not satisfied with his view of the law to come before this Court upon exceptions. Were we to condemn this established practice now, and to go back to a strictly limited view of the Master's judicial functions under his delegated authority, there is no doubt, as certain points in the history of the case now before us might show, that we should be placing insuperable obstacles in the Master's path in arriving at a practical decision, reached by means employed according to his own discretion upon the points submitted to him by the Court. And, unless an argument upon those means is to precede the framing of the order of reference we believe that the only course consistent with economy both of time and money, with public convenience and with that *finis litum* which is the interest of the common wealth, is that any subsequent objection to the legality of the Master's proceedings should be taken by way of exception to the Master's report and not by separate appeals

on incidents arising, or by such applications as the one now before us.

In this belief and for these reasons, we must decline to issue the writ prayed for; but we may add that, even had we considered that the Master had exceeded his powers, and should be checked summarily in the further exercise of them, we should have felt unwilling to proceed by a writ of Prohibition, which in our view, is addressed only to courts *independent* of, as well as inferior to the Court of Issue, whereas, as we have intimated, the Master's Court is, in our opinion, essentially *dependent* upon our own.

With Costs.

SUPREME COURT

ACTION IN "TIERCE OPPOSITION" ENTERED BY DECLARATION WITHOUT LEAVE OF COURT PREVIOUSLY OBTAINED—PRELIMINARY OBJECTION—ARTICLES 79 & 118 OF THE RULES OF COURT—APPLICATIONS FOR TIERCE OPPOSITION MUST BE MADE BY MOTION, ON A NOTICE WITH SUMMONS—A JUDGE MAY OTHERWISE ORDER—NO DISTINCTION BETWEEN TIERCE OPPOSITION AS ORIGINAL PROCEEDING OR AS INCIDENTAL APPLICATION—PLAINTIFF NON-SUITED WITH COSTS.

The plaintiff had commenced an action based upon "tierce opposition" by declaration, without special leave from the Court obtained before the entering of the action.

The Court, upon a preliminary exception taken to the procedure, ruled:

10. *That articles 79 & 118 of the Rules of Court were perfectly explicit upon this subject; that applications for tierce opposi-*

tion must be made to the Court summarily by motion, on a notice with summons, unless the Court or a Judge should otherwise order in any particular case.

20. That article 79 does not make any distinction between a "tierce opposition" entered as an original proceeding, and a tierce opposition as an incidental application.

A non-suit was directed with costs.

—
MINERVE,—Plaintiff,

versus

THE CENTRAL SUGAR ESTATES
COMPANY OF MAURITIUS LIMITED
IN LIQUIDATION & ors,—Defendants.

—
Before

His Honor E. J. LECLÉZIO,—Chief Judge,

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—
H. GALÉA,—Counsel for plaintiff,
W. EDWARDS.—Attorney for the same.

P. L. CHASTELLIER, W. NEWTON, Y. JOLLI-
VET & H. HEWETSON,—Counsel for defend-
ants,

E. DUVIVIER, H. LECLÉZIO and L. DE ST
PERN,—Attorneys for the same.

—
Record No. 23,225.

31st March 1886,

The preliminary point upon which we have heard an argument in this case is whether an

action based upon "tierce opposition" can be commenced by declaration without special leave from the Court obtained before commencement of the action.

Rule 79 of the rules of the Court appears to be perfectly explicit upon this subject "applications for tierce opposition shall be made to the Court summarily " by motion—subsequently by rule 118, on a " notice with summons "—" unless the Court " or a Judge should otherwise order in any " particular case. " In this case no such order was originally applied for or made, and the action was commenced by declaration instead of on a notice with summons.

There is no question as to what this rule implies or as to what the jurisprudence of the Court has been up to now upon the point. The case of *Canot versus Hitié*, Reports *Piston's* 1862 p. 150 offered stronger claims upon the Court's indulgence in view of the neglect of the strict letter of the rule than does this case now before us; but in *Canot vs Hitié*, where the rule had been partially observed, and the action in " tierce opposition " had been commenced by motion according to the original form of rule 79 instead of on notice with summons according to the amended rule, the Court still refused to interfere with the operation of the rule or to allow any amendment of the form of action after its commencement.

In the case of *Loiseau vs. Jouanis* (1880) a similar jurisprudence was followed, based upon the practice of the English Courts.

In the present case, it is urged upon us that the nature of the action renders its commencement by declaration imperative, and that one of the plaintiffs at least may lose his remedy if the action does not proceed. We are unable to see in either of these arguments any justification for neglect of the rule. It

- may well be that the action necessitates a declaration, being an original proceeding and not an incidental application; but rule 79 makes no distinction whatever between these two classes of application in "tierce opposition" and we feel no inclination to create one in justification of wilful neglect of our own rule as it stands.

We do not dismiss the action, but we direct a non-suit — and, as the infraction of the rule seems to us very clear, and as it has been persisted in by plaintiff although pointed out in the pleadings, we think that we should allow costs.

SUPREME COURT

AMOUNT OF BILLS OF COSTS TRANSFERRED BY NOTARY—ONE OF THE DEBTORS PAYS THE PURCHASER WHO SUBROGATES HIM IN HIS RIGHTS AGAINST THE OTHER DEBTOR — CLAIM OF SUM PAID TO NOTARY FROM THE OTHER DEBTOR— PLEA OF THE LATTER— HE IS THE CREDITOR NOT THE DEBTOR OF THE NOTARY—MOTION FOR LEAVE TO CALL WITNESSES AND EXAMINE THE NOTARY ON HIS PERSONAL ANSWERS— OBJECTIONS TO COURSE PROPOSED—THE DEFENDANT HAS NO DOCUMENT BEARING A DATE CERTAINE — HE DID NOT PROTEST WHEN SERVED WITH NOTICE OF TRANSFER— EXAMINATION OF SEVERAL THEORIES UNDER ARTS. 1328 & 1690 CIVIL CODE—COURT REFUSES UNDER THE CIRCUMSTANCES OF THE CASE, THE MOTION FOR ORAL EVIDENCE AND EXAMINATION OF THE NOTARY UPON HIS PERSONAL ANSWERS.

A notary transferred to A the sum of Rs 7884, amount of several bills of costs represented to be due by B & C, jointly and severally.

B, afterwards, paid Rs 3000 to A who, renounced all recourse against him for the balance of the claim and transferred to him all his rights against C, but up to the Rs 3000 only.

Upon B claiming the Rs 3000 from C, the latter pleaded that he was not the debtor but the creditor of the notary for Rs 19,000, and prayed for leave to call witnesses to establish the fact, and also to make the notary a party to the cause that he might examine him on his personal answers in order to obtain a beginning of proof rendering likely his allegation that the notary owed him money.

This was objected to upon the ground, inter alia, that C had no receipt, no document bearing a "date certaine," and because C had not, when served with the notice of transfer, nor immediately after it, declared that he was the creditor of the notary, and because the admissions of the assignor could not, under these circumstances, be binding upon his assignees.

After examining several theories under articles 1328 and 1690 of the Civil Code, the Court considered that it would be going against the true spirit of these articles to allow the defendant who received notification of the transfer without any reservation or protest, made either at the time or immediately after the service, and who did not produce any written document in support of his contention, to call now the assignor to obtain from him an admission that he was the debtor of C.

The motion for leave to call witnesses and for the examination upon personal answers was refused with costs.

BRUE,—Plaintiff,

versus

L. BAX,—Defendant.

MINVIELLE,—Intervening party.

—
Before

His Honor E. J. LECLÉZIO,—Chief Judge,

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—
Puisne Judge

—
G. GUIBERT—Counsel for plaintiff,
G. KÖNIG,—Attorney for the same,
W. NEWTON,—Counsel for Defendant,
E. SAUZIER,—Attorney for the same.

—
Record No. 23224.

31st March 1886.

The facts of this case are the following :
Brue sold to Bax the Estate " Providence " and its dependencies in July 1882 and all the deeds connected with the purchase and with the payment of the price were at the request of Bax prepared by Mr. Notary Pitot ; the costs due for all those deeds amounted to Rs. 7884.69 c. according to the bills taxed by the Chamber of Notaries and by the Registrar of this Court. Mr. Notary Pitot transferred to Jean Auguste Minvielle the amount of these bills on the 27th February 1884, declaring to him in the deed of transfer that the bills were due both by Brue and by Bax jointly and severally, the deed of transfer was notified to Brue on the 31st March 1884 and Minvielle afterwards entered an action against him to recover the claim so transferred ; on the 17th June 1885,

Brue paid to Minvielle a sum of Rs. 3000 in consequence of which Minvielle renounced all recourse against Brue for the balance of the claim transferred by Pitot and did transfer to Brue all his rights against Bax resulting from the deed of transfer of February 1884, but only up to the amount of Rs. 3000—Minvielle reserving his rights against Bax for the payment of the balance— Brue now says in his declaration that he is the creditor of Bax for these Rs. 3000 forming part of the claim of Rs. 7884.79 originally due to Pitot by Bax and demands a judgment against Bax for that sum.

In his plea Bax says that he is not indebted either to Pitot or to Minvielle and that he is on the contrary the creditor of Pitot in the sum of Rs. 19000. Thereupon Minvielle was summoned by Brue to intervene in the case in order to guarantee him from the consequences of Bax's plea. Minvielle has intervened and produced the bills of notary Pitot to establish his claim. Bax prayed for leave to call witnesses to prove that he is the creditor of Pitot as alleged by him for sums received by Pitot for account of Bax. This being objected to in Chambers the matter was referred to Court and Bax now moves that Pitot be made a party to the cause that he be examined on his personal answers in order to try to obtain a beginning of written proof rendering likely his allegations that Pitot is indebted to him in R. 19,000 for sums received, Bax alleges that at the time of the transfer of the bills by Pitot there was an accounting to take place between him and Pitot No notice of this motion was given and it was resisted by Minvielle and Brue not only on that ground, but because even if properly made and granted the admissions of Pitot would not be binding upon the assignees. It was argued for them that Bax wants to invoke a compensation based on answers of Pitot examined on " faits & articles " Bax has no receipt, no document having a

"date certaine" before the transfer, there was no declaration made at the time of the service of the transfer on Bax, nor immediately after it, that he was the creditor of Pitot, and the admissions which Pitot might now make would not be binding on the assignees of Pitot.

The question which arises under article 1690 Code Civil of knowing whether the assignee is always the *ayant cause* of the assignor and whether all exceptions that can be taken by the debtor against the assignor can also be urged against the assignee at any time is still a vexed question among the commentators of the Civil Code. An *arret* of the Court of Cassation of the 23rd August 1841 (S.V. 41.1.756) has decided in a case in which the circumstances were more favorable to the debtor than in the present one that the assignee could not be considered as the *ayant cause* of the assignor; in that case the debtor produced a document showing his liberation but which was only registered after the notification of the transfer, when no opposition had been made to it at the time of the service. In a note to this "*arret*" of the Court of Cassation, it is stated that an opinion seems to prevail now to the effect that the receipts or discharges signed by the assignor may be opposed to the assignee when produced by the debtor immediately after the service of the transfer; it is this opinion which Troplong in his "*Commentaires de la vente* Vol. 2 No. 920" appears to have adopted. Demolombe "*Obligations* (Vol. 6") after having examined the different systems with regard to the interpretation of article 1690, considers the assignee as a third party in all cases and not as "*ayant cause*"; but he is disposed to make a concession within certain limits to those who think that in practice, a strict interpretation of article 1328 would create grave inconveniences by compelling parties to register every document having for its object to prove a discharge and after quoting La-

rombière Vol. 4 No. 23 — 26. Demolombe adds: "pour notre part nous estimons que la meilleure base sur laquelle il conviendrait de poser cette exception à l'article 1328, relativement aux actes sous seing-privés portant quittance, serait l'intention vraisemblable du législateur qui les en aurait tacitement exceptés. Et cette intention du législateur nouveau peut paraître en effet d'autant plus vraisemblable qu'en donnant aux besoins de la vie civile et à l'utilité pratique la satisfaction qu'ils réclament il ne faisait que confirmer sur ce point les traditions constantes de notre ancien droit" — But Demolombe limits that exception to what he calls "des actes nécessaires, des actes d'administration, comme le paiement après lequel tout est fini" he adds that there are no motives to "extend the exception to other acts".

Here we have no acts tendered, and we have not seen in any of the authors or of the decisions of the French Courts that a debtor was allowed to call the assignor of a claim to be examined on "*faits et articles*" to establish a discharge or set off by his answers to be opposed to the assignee. Even those who are in favor of a relaxation from the rigid application of the rule laid down in article 1328 think that it is for the party who produces an unregistered acquittance to show by the circumstances of the case that the date borne upon it is a bonafide one (see Larombière) and we are of opinion that it would be going against the true spirit of articles 1328 & 1690 combined, to allow a debtor in the position of Bax who received the notification of the transfer without any reservation or protest, immediately after the service, to call now the assignor Pitot before the Court in order to obtain from him an admission binding upon the assignee that when the transfer was made he was the debtor instead of the creditor of Bax.

We therefore refuse the motion to call Pitot and hear witnessess, with costs against Bax.

SUPREME COURT

NOTICE PREVIOUS TO LEVY—ACTION IN NULLITY OF THE SAME—10, 20, & 30 YEARS PRESCRIPTION]—ORDINANCE 15 OF 1878, ART. 35—GOOD FAITH OF PLAINTIFF PUT IN QUESTION—ORD. 16 OF 1883, ART. 6—DEFENDANT HAD TWO YEARS FROM PROMULGATION OF ORDINANCE TO ENTER HER ACTION—INSCRIPTION OF MORTGAGE OF DEFENDANT IN DECEMBER 1868—DEFENDANT CANNOT INVOKE TEN YEARS PRESCRIPTION, THEREFORE, AGAINST THAT MORTGAGE.

JUDGMENT—ART. 35 OF ORD. 15 OF 1878 APPLIES TO ALL MINORS—MEANING OF THE WORDS ANY RIGHTS IN THE ARTICLE—IT INCLUDES RIGHTS OF MORTGAGE AS WELL AS OWNERSHIP—PRESCRIPTION NEED NOT BE ESTABLISHED AGAINST RIGHTS OF MORTGAGE AS WELL AS RIGHT OF OWNERSHIP—NOTICE PREVIOUS TO LEVY DECLARED NULL AND VOID—COSTS.

A notice previous to levy was served on plaintiff at the request of defendant on the 22nd day of July 1885, asking him to pay her a certain sum due to her by her father's succession or to quit and abandon two plots of ground purchased by him in November 1853 and August 1885 from her said father.

The plaintiff then entered the present action in nullification of the notice in which he urged inter alia. 1o. that admitting even that defendant was the bonâ fide creditor of her father, the plaintiff had prescribed against her, by the 30 and 10 years prescriptions; and, 2o. that she was barred from exercising

her rights, if any, by the effect of article 35 of Ordinance 15 of 1878.

For the defendant, it was argued:

1o. That although the plaintiff might have acquired the ownership of the land against the vendor, yet, he not having been "of good faith," he had not prescribed by the 10 years prescription against the right of mortgage of defendant, which had been inscribed in December 1868.

2o. That under Article 6 of Ordinance 16 of 1883, the defendant had two years from the 31st July 1883, (date of the publication of the Ordinance) to bring her action against the plaintiff whose first purchase was made only in November 1853, and that she had done so in due time by means of the notice previous to levy served on plaintiff in July 1885.

Held by the Court:

1o. That art. 35 of Ord. 15 of 1878 clearly applied to those minors who, like defendant, had attained their majority previous to the Ordinance.

2o. That defendant had two years from the 12th April 1880 (date of the promulgation of Ordinance 15 of 1878) to exercise, in terms of the above art. 35, any rights she might pretend to have against those who held and might have acquired real property under the ten years, 20 years, or 30 years prescription.

3o. That the words any rights in that article include rights of mortgage as well as of ownership.

4o. That it is necessary that the prescription to be proved should be established as well against the right of mortgage as against the right of ownership.

Considering that the defendant was barred by the effect of art. 35 of Ord. 15 of 1878, the

notice previous to levy served upon plaintiff was decreed to be null to all intents and purposes. Costs against defendants.

—
EDWARDS,—Plaintiff

versus

MARTIAL THE WIFE,—Defendant

—
Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor E. DIDIER ST. AMAND,—Acting

Puisne Judge

—
L. ROUILLARD,—Counsel for plaintiff

P. E. DE CHAZAL,—Attorney for the same.

H. GALÉA,—Counsel for defendant

L. WOERNITZ,—Attorney for the same.

Record No. 23196.

31st March 1886.

The Defendant Mrs. Martial, caused a notice previous to levy to be served on the plaintiff on the 22nd July 1885, calling upon him to pay to her Rs 39,134.14, which she alleged to be due to her by the succession of her father Jean Baptiste Paul Mélidor Chéron or to quit and abandon two plots of land mentioned in the notice and which plaintiff had purchased from Chéron. The plaintiff thereupon entered the present action and in his declaration, after having denied that the defendant is the lawful creditor of her father's succession, he says that the claim, if any, of the defendant is prescribed by plaintiff as third holder in terms of article 2180 of the Code Civil, paragraph four and in terms of article 2265. The plaintiff avers that he did

bona fide and with just titles duly transcribed buy from the late Chéron 1st a portion of two acres at "l'eau coulée" by notarial deed on the 18th November 1853 for \$ 100 paid cash 20. a portion of 5 acres contiguous to the 1st portion by notarial deed on the 21st August 1855 for a price of \$ 180 paid cash — that more than 10 years have elapsed between the time when those two sales were transcribed and the 28th december 1868 when the inscription of the defendant's alleged legal mortgage was taken and that more than 30 years have elapsed since the plaintiff has purchased and possessed the two portions of land and the plaintiff asks the Court to decree that the defendant has no right of action against him.

The principal pleas of the defendant are that she is the creditor of her father's succession — that prescription could only begin to run against her on the 12th September 1868 on which day she became of age and that with regard to prescription under article 2265 of the Civil Code the plaintiff cannot plead good faith on account of the mention made in the deed of sales that the vendor Chéron was a guardian, and lastly that the fact of more than 10 years having elapsed between the transcription of the plaintiff's title deeds and the inscription of the defendant's legal mortgage, cannot bar the defendant's rights in as much as such legal mortgage was until the 28th December 1868 at least dispensed with inscription. By an amendment to the declaration allowed in Chambers after the defendant's plea the plaintiff invoked the local ordinance No. 15 of 1878, according to which prescription runs against minors and says that the defendant was bound to exercise her rights within two years after the promulgation of that Ordinance.

In Court the issue referred to in the last plea was not insisted upon by the plaintiff but it was argued on his behalf, 1st that there was no satisfactory evidence that the defendant

is the creditor of her late father. 2o. that admitting the defendant to be *bona fide* creditor of her father, the plaintiff has prescribed against her in several ways, in the first place by the prescription of 30 years, especially as to the first sale, and by the prescription of 10 years with regard to the two sales. 3o. that the defendant was barred from exercising her rights if any by the effect of article 35 of ordinance 15 of 1878.

This Ordinance contains a Chapter on "prescriptions" the first article of this chapter is article 34 which runs thus: "From and after promulgation of this Ordinance the exception enacted in favor of minors and interdicted persons by article 2252 of the Civil Code shall have no force against, and shall not bar the rights of those who shall have acquired real prescription of 10, 20 or 30 years as the case may be, under the Civil Code and Ordinance No. 10 of 1874, unless, however, the minor within two years after he has attained his majority or the interdicted person within two years after the interdict has been removed, or their representatives exercises or exercise his or their rights in and over such real property."

Article 35 enacts as follows: "Those minors who shall have attained their majority and those interdicted persons whose interdiction shall have been removed previous to the promulgation of this Ordinance shall be bound to exercise any rights they may pretend to have against those who hold and have acquired real property under the ten years or the 20 years or the 30 years prescription within two years after the promulgation of this Ordinance or they shall be barred."

Ordinance 15 of 1878 was promulgated by proclamation on the 12th April 1880.

A subsequent Ordinance No. 16 of 1883 to amend the law as to the limitation of actions published on the 31st July 1883 enacts as follows, article 5 "The time required for prescription shall never in the cases in which it is suspended by the effect of articles 2252 and 2256 of the Civil Code exceed thirty years including the period of suspension, article 34 of ordinance 15 of 1878 is amended in so far as it is inconsistent with the provisions of this article.

Article 6 "Whenever by the effect of this Ordinance any person shall be debarred of any action which he might otherwise have had, it shall be lawful for such person to begin any such action within the time allowed by the law in force immediately previous to the commencement of this Ordinance provided that such time shall not exceed two years from the said commencement."

For the defendant it was argued that, although the plaintiff had acquired the ownership of the property purchased by him *quoad* the vendor, the effect of this last enactment was such that she, the defendant had two years from the 31st July 1883 to bring her action against the plaintiff, whose first purchase was made only in November 1853 and she had done so by serving her notice previous to levy on the 22nd July 1885—it was also argued for the defendant that article 35 of Ordinance 15 of 1878 applied only to the past, that the plaintiff had not prescribed her the defendant's mortgage by 10 years, on account of his want of good faith as already mentioned, before the passing of the Ordinance that 30 years had not elapsed from the time of the purchases to the date of the passing of the Ordinance and consequently that this article could not apply to the present case.

There is no doubt that if article 34 of Ordinance 15 of 1878 as amended by article 5

of Ordinance 16 of 1883, stood alone the position of the defendant might be very strong in case the plaintiff failed to establish that the mention of Chéron's guardianship in the deeds of sale does not render him a third holder of bad faith *quoad* the holder of a legal mortgage; but the plaintiff relies especially on article 35 of Ord. 15 of 1878 which has not been interfered with by Ord. 16 of 1883, and after mature consideration of all the laws quoted in the argument we have come to the conclusion that we cannot interpret this article as the defendant has done. Article 35 clearly applies to those minors who had attained their majority previous to the promulgation of the Ordinance—the defendant became of age in 1868. Those minors had two years from the promulgation of the ordinance which took place on the 12th April 1880 “to exercise *any rights* they may pretend to have against those who hold and “have *acquired real property* under the 10 “years, the 20 years or the 30 years prescription.” Now it is admitted by the defendant that the plaintiff had acquired the land in question *quoad* the vendor and that besides he had enjoyed it with a just title for more than 10 years.

We must therefore hold that the defendant was bound to enter her action against the plaintiff if any she had, within the two years which followed the promulgation of the Ordinance that is to say, before the 12th April 1882. It is to be remarked from the terms of this article that the rights to be exercised are *any rights* which in our opinion mean rights of mortgage as well as of ownership and that such rights are to be exercised against those who have *acquired real property* under the several modes of prescription mentioned, that is to say against those who have prescribed the ownership of the property in that way, this part of the enactment cannot mean as suggested for the defendant that the prescription to be proved should be as well for the

right of mortgage as for the right of ownership. We find in it no ambiguity—and we think that it is sufficient that the right of ownership be acquired as admitted in this case, in order to entitle the third holder to say to the minor who was of age before the promulgation of the ordinance: you had two years to make good your claim and having omitted to do so within that time you have lost your rights if any you had against me. We consequently hold that the defendant is barred by the effect of article 35 of Ordinance 15 of 1878.

Having decided this point in favor of the plaintiff, we consider it unnecessary to examine the other issues raised in this case. We must therefore decree that the defendant has no right of action against the plaintiff and that the notice previous to levy served on the 2nd July 1885 upon plaintiff is null and void to all intents and purposes, with costs against the defendant.

SUPREME COURT

PROVISIONAL SEIZURE OF GOODS.—INTERPLEADER SET ASIDE BY DISTRICT COURT—APPEAL.—PRELIMINARY OBJECTIONS.—AFFIDAVITS SWORN CONCERNING VALUE OF GOODS.—NO PROVISIONAL SEIZURE KNOWN UNDER OUR DISTRICT COURT RULES.—“SAISIES-CONSERVATOIRES” UNDER ART. 417 OF THE CODE OF CIVIL PROCEDURE—NO TEXT CONCERNING THE PROCEDURE OF THESE SEIZURES.—RULES CONCERNING SAISIES-EXECUTIONS TO BE APPLIED BY ANALOGY.—MEANING OF WORDS: “TAKEN IN EXECUTION UNDER PROCESS OF THE COURT” IN ART. 90 OF DISTRICT COURT RULES—DECISION OF MAGISTRATE REVERSED.

A provisional seizure having been made of certain goods by order of a District Magistrate,

a third party pretending to be the owner of the goods, claimed them by way of interpleader.

The Magistrate decided that as the seizure was only a provisional one, the interpleader was not competent.

On appeal, it was argued by respondent, that there was nothing on Record to show that the matter at issue was of the appealable amount, and that the Magistrate having converted the the provisional seizure into a final one by a subsequent judgment, nothing prevented the appellants from making now an interpleader claim under that final order.

The Court allowed affidavits to be sworn to establish that the value of the goods were of an appealable amount, and overruled the second objection on the ground that the appellant if they began proceedings anew could not begin them "de novo" on the same footing, the seizure not being any longer a provisional seizure and the magistrate's judgment not having been an interlocutory one.

On the question decided by the magistrate, the Court considering :

That there is no provision in our District Court Rules concerning provisional seizures and that our District Courts grant them under art. 417 of the Code of Civil Procedure.

That in France there is no special text to regulate the procedure to be followed for the provisional seizures (*saisies conservatoires*) under the above art. 417.

That the French authorities seem to be agreed that in the absence of such provisions, the rules concerning the *saisies-exécutives* as found in the Code of Civil Procedure, art. 608 and following should, by analogy, be extended to the *saisies-conservatoires* of art. 417.

That the word "*saisie*" of art. 608 aforesaid may apply to goods seized provisionally as

well as to those seized finally and that the same interpretation may be given to the words "taken in execution" under art. 90 of our District Court Rules ;

Reversed the decision of the District Court with costs.

—
LEONG FOOPEN,—Appellant

versus

JAFFAR HAROON & AH-KAN,—Respondents.

—
Before

His Honor E. J. LECLERQ, — Chief Judge.

And

His Honor F. C. WILLIAMS, — Puisne Judge

—
L. ROUILLARD, — Counsel for appellant

V. DUCASSE, — Attorney for the same

F. MATHEWS, — Counsel for Respondents

E. LEBLANC, — Attorney for the same.

—
Record No. 859.

27th April 1886.

This is an appeal from a judgment of the District Magistrate of Plaines Wilhems in an interpleader case. When the case was called before us the point was taken for the respondent Jaffar Haroon that there was nothing in the record to show that the matter at issue was of an appealable amount; the record was then sent back to the Magistrate to have the memorandum of seizure added to it, but the seizure having been made in virtue of an order of the District Magistrate of Port Louis before whom the main action between Jaffar Haroon and Ah-Kan had been entered, it appears that the memorandum had been sent to him according to practice and no copy of it

had been filed before the Magistrate of Plaines Wilhems, the only point heard by him being one of law. The appellant then moved to be allowed to prove that the amount at issue was appealable; this was objected to, but we allowed the appellant to file affidavits to show that the matter at issue was of more than Rs 200, in conformity with previous decisions of this Court both in appeals to the Privy Council and in appeals from District Courts. (See *Valentin vs. Pastourel*, 1871, p. 79; *Loiseau vs. Gontier*, 1880, p. 24; *Oriental Bank vs. Official Assignee Richer*, 1882, p. 38; *Lucas vs. Ayoob Jacobs* 1880, p. 113; *Dominique vs. Arlapen*) judgment of 22nd February 1883, not reported.

No counter affidavit was filed by the respondent Jaffar Haroon and the case was proceeded with, when a second objection was taken for the respondent to the effect that the judgment appealed from was not final in as much as the decision of the Magistrate who held that there could be no interpleader in matters of provisional seizure, did not prevent the appellant from beginning again his proceedings of interpleader, now that the seizure had become a final one after the judgment of the District Magistrate of Port Louis in favor of Jaffar Haroon against his debtor Ah-Kan. We, however, overruled this objection because we were of opinion that the Magistrate's judgment was final, in this sense that the appellant could not have begun *de novo* his interpleader on the same footing, that is to say while the seizure was still provisional and the Magistrate's decision could not be considered as an interlocutory one.

We now come to the ruling of the District Magistrate, namely: that an interpleader claim cannot be made on a provisional seizure. The question depends upon the interpretation of section 90 of the District Court rules which runs as follows:

"Where goods and chattels have been taken in execution under the process of any District Court, should any third party claim the goods and chattels, etc., the claimant may lodge an opposition into the hands of the usher charged with such execution either against the sale of such property or against payment to the execution creditor of the proceeds of the sale". The whole question therefore, says the learned Magistrate turns upon the interpretation to be given to the words "*taken in execution under the process of the Court*" and he comes to the conclusion that the District Court rules on interpleaders having been borrowed from the English County Court rules and the bailiff in England acting only after judgment, our rule 90 means that the goods can only be claimed by a third party after judgment has been given in the main action between the execution creditor and the execution debtor.

Our District Court rules contain no enactment relative to provisional seizures or "*saisies Conservatoires*"; the powers of District Courts in such matters are derived from Article 417 of the Code of Civil procedure, in the title *Procédure devant les Tribunaux de Commerce* it was argued that the seizure allowed in virtue of this article is not an "*acte d'exécution*" it may be said that it is not an execution in the strict sense of that word, but it is to be presumed that the framers of the rules did not lose sight of the provisions of the Code of Civil procedure which were still in force. One of those provisions is article 608 which enacts: "*Celui qui se prétendra propriétaire des objets saisis ou de partie d'iceux, pourra s'opposer à la vente, etc.*", it gives a remedy, similar to that contained in our rule 90 to a third party who claims the goods seized as his own; article 608 is to be found in the title: "*Des saisies exécutoires*" and it was argued for the respondent that it could not be applied to the provisional seizure made in virtue of

article 417, we however read in Bioche *vo. Saisies Conservatoires*, p. 17. "*La saisie conservatoire établie comme un droit par plusieurs articles du Code n'a été réglementée par aucun quant à la procédure, il est donc nécessaire sous ce dernier rapport de recourir à l'analogie*" and in Dalloz *vo. "Saisie Conservatoire"* No. 19. "*Quant à la forme dans laquelle il doit y être procédé, il y a lieu dans le silence de la loi de se conformer aux règles prescrites pour la saisie exécution qui est le type de toutes les autres saisies mobilières*". When the law is silent we must often have recourse to analogy and borrow the rules which we find enacted for proceedings of a similar nature, more especially so when we do not find in the wording of these rules any expression which would be contrary to their application by analogy. Now in section 90 of the District Court rules the words "taken in execution under the process of the Court," may in our opinion, apply as well to goods seized provisionally as to those seized after judgment, an interlocutory order of the Court authorising a provisional seizure is certainly a process of the Court, and goods seized in virtue of such an order may be said to be taken in execution of the process of the Court. In the same manner the word "saisis" of Article 608 of the Code of Civil procedure may apply to goods seized provisionally as well as to those seized finally and we find that interpleaders in matters of provisional seizures have several times been discussed before this Court—see cases of Duprat and Laroque *vs.* Capeyron 1869 p. 45; Baya *vs.* Grassy 1871, p. 80, Danguet *vs.* Moosaheb 1883, p. 89; it is true that the point now at issue was not then raised, but those cases show what is the the accepted practice. Besides why should a difference be made between a provisional and a final seizure with regard to an interpleader claim? the true owner of the goods has the greatest interest to see his claim adjudicated

upon immediately, whether the seizure be provisional or not, and we fail to see what can be the interest of the seizing creditor in contending that the claimant must wait till the main action to which he is no party, be decided before entering the interpleader proceedings.

We must therefore hold that an interpleader claim may be entered on a provisional seizure being made, and quash the Magistrate's judgment with costs both here and in the Court below. The case is referred back to the Magistrate to be proceeded with on the merits.

SUPREME COURT

TAXATION OF COSTS BY REGISTRAR.—APPEAL

—FEES TO COUNSEL.—COSTS OF THE DAY.

— COURT REFUSES TO INTERFERE WITH TAXATION OF COUNSEL FEES.—CONSIDERS THAT COSTS OF THE DAY MEAN COSTS OF THE INCIDENT AND NOT SIMPLY COSTS OF THE ACTUAL DAY. — REGISTRAR'S DECISION AMENDED.

In this case, which was an appeal from a taxation of costs, the Court refused to interfere with that part of the Registrar's taxation which related to counsel fees.

As to the costs of the day which had been ordered to be paid by the defendant as the condition of amending his plea, the Court, agreeably to the construction put upon such words in England, and construing the terms according to the intention of the Judges who awarded the costs, considered that they meant: costs of the incident, rather than those of the actual day.

The bill of costs was therefore modified so as to include all expenses rendered necessary by the amendment of the plea, whether upon the day of hearing or after it.

**THE COLONIAL FIRE INSURANCE
COMPANY.—Appellants**

versus

THE MUNICIPALITY,—Respondents
and

THE MUNICIPALITY,—Appellants

versus

**THE COLONIAL FIRE INSURANCE
COMPANY,—Respondents**

—

Before

His Honor F. C. WILLIAMS,—Puisne Judge

and

**His Honor E. DIDIER ST. AMAND,—Acting
Puisne Judge**

—

**W. NEWTON,—Counsel for the Municipality,
E. LAURENT,—Attorney for the same.**

**P. L. CHASTELLIER,—Counsel for the Fire
Insurance Company.**

G. A. BITTER,—Attorney for the same.

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Records No. 23442 & 23447.

4th May 1886.

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In these two appeals from taxation of the registrar, the questions before us are, partly as to the exercise of the Registrar's discretion in fixing the amount of fees to Counsel and partly as to what should be allowed under an award by the Court of "costs of the day"—In the matter of pure discretion as to the amount of Counsel's fees, we are unwilling to interfere with that exercised by the Registrar.

In one instance, where a case was opened for the plaintiff and proceeded no further, he

allowed the maximum fee which in ordinary cases should accompany a brief, and in another he reduced the senior Counsel's fee from Rs 400 to Rs 200 in a case which occupied only a few hours when it came to hearing, and disallowed a fee to a junior Counsel, who, as a matter of fact, took no part in conducting the case in Court. We do not wish to be understood as laying it down that a fee for a junior Counsel is in no case to be allowed, nor yet that in no case a higher fee than Rs 200 to Counsel should be allowed on taxation, but, under the particular circumstances of this case, we see no good ground for interference, though we would wish to remark that our estimate of the value of counsel's services in the matter is not in question. All that we have to consider is what costs should be allowed between party and party. The question of what the Court intended to be included in "Costs of the day" ordered to be paid by the defendant as the condition of amending his plea, is however, a different one. We are assured that the term "Costs of the day" according to the practice of this Court, means only the actual costs involved on the day itself in the day's proceedings. In England, the term seems to have a different signification. In the present case we think that the term should be construed according to the intention of the Judges who awarded the costs, and, as it is left to us to interpret those intentions, we believe that the costs intended by the Judges who heard the case were the costs of *the incident* rather than those of the *actual day* in spite of the term employed.

And thus, while we do not blame the taxing officer for interpreting the term "costs of the day" in accordance with what is stated to be the usage here, we shall, according to our view of the judges' meaning in making the order, direct that the first bill of costs of July 17th, 1885, be amended so as to include all expenses rendered necessary by the amend-

ment of the plea whether upon the day of the hearing or after it. In other words, the first ten items struck out upon taxation of this bill will be allowed.

We do not think that we should allow any costs of this appeal.

SUPREME COURT

CLAIM OF A CASE OF GOODS SHIPPED FOR MADAGASCAR.—DEFENDANTS' PLEA.—NO EVIDENCE TO GO TO A JURY.—OWNERSHIP OF THE CASE OF GOODS UNCERTAIN.—DEFENDANTS NOT TO BE MADE TO PAY COSTS, THEY HAVING ACTED LEGALLY AND MERELY AS AGENTS.—PLEAS OVERRULED.—JUDGMENT AGAINST DEFENDANTS PERSONALLY, WITH COSTS.

The plaintiff claimed from defendants delivery of a case of goods shipped in Mauritius on board the "Argo" for Madagascar and unduly detained by them there.

Defendants urged that the evidence of plaintiff was not sufficient to allow the matter to go to a jury, and that they, acting merely as Agents of the "Compagnie Ouest Maritime" had dealt legally in the matter and consequently should not personally be held liable to costs of the suit, if the verdict were favourable to plaintiff.

The Court found that the plaintiff had sufficiently established his claim to the goods, and condemned defendants personally to pay the costs in the first instance, leaving them to exercise their recourse, if any they had, against the Ouest Maritime Company.

SAIBOO—Plaintiff

versus

PROCTOR brothers—Defendants

Before

His Honor E. J. LECLÉZIO—Chief Judge

and

His Honor E. DIDIER ST. AMAND—Acting
Puisne Judge

W. NEWTON,—Counsel for plaintiff

H. BERTIN,—Attorney for the same

P. L. CHASTELLIER,—Counsel for defendants

G. A. RITTER.—Attorney for the same

Record No. 23173,

21st May 1886.

This case has already been heard by the Court upon certain preliminary objections which were overruled by an interlocutory Judgment delivered on the 12th of March last. The claim of the plaintiff is for the delivery of a case of goods shipped per Steamer Argo in 1882 and landed at Tamatave in the stores of the defendants, or for Rs 800 the value of the goods. Since the interlocutory Judgment the declaration was amended with regard to the date of the voyage of the Argo; it had been alleged at first that it was by the may voyage of the steamer that the case had been sent to Tamatave; it is now alleged that it was by its march voyage that the "Argo" carried the case, in consequence of this amendment additionnal pleas were filed by the defendants. Both parties had also applied for leave to prove certain facts by parole evidence but in Court they both gave up their applications for hearing witnesses, and the action was argued upon the documentary evidence tendered and the deposition taken *de bene esse* by the Master of the Court, of Mr. Samuel Proctor, one of the defendants. After the argument of the learned Counsel for the plaintiff the defendants counsel argued : 1o. that the

plaintiff had not proved his case by means of the evidence laid by him before the Court, and as there was no case to go to a jury he was entitled to ask the Court on behalf of the defendants to dismiss the action without looking into the defendants' evidence which might help the case of the plaintiff to a certain extent, especially if certain admissions contained in their pleas but which were qualified, were divided instead of being taken as a whole. So, that the difficulties which the defendants had had to contend with were not of their own making, that they had dealt with the matter legally and as agents of the "Compagnie ouest Maritime" and that if the Court found that the case in their stores should be delivered to the plaintiff they should not be condemned personally to pay the costs of the suit.

With regard to the 1st part of the defendants' argument we think that the evidence laid by the plaintiff was sufficient, in the absence of any contrary evidence, to entitle him to obtain the delivery of the case now in the stores of the defendants. It results from the document emanating from the Customs Office that a case marked J A N, was shipped by one Murday Mootoo on the 27th february 1882 per Argo for Tamatave, it is true that in the Judgment of the District Court which decrees that Marday Mootoo had transferred to the plaintiff the case sent to Tamatave the marks given are M M, but the letter of Mr. Waterhouse the defendants' representative to the British Consul at Tamatave dated the 31st May 1884 alludes to a case marked J A N in his stores which was claimed by the plaintiff as assignee of Marday Mootoo.

We may here remark that Mr. Waterhouse's letter speaks of the case as having arrived by the may voyage of *Argo*, which may have contributed to lead the plaintiff into the error committed at first as to the date of the voyage. We read also in an affidavit of Mr. Samuel

Proctor sworn to on the 4th September 1885 and tendered by the plaintiff, the following words: "our defence on the merits being that the plaintiff has no right to the case which is in our stores and which he alleges to be his own and to which case the "Compagnie Ouest Maritime" also alleges a right to"—When examined *de bene esse*, Mr. Proctor said the "case of goods subject matter of this suit, I believe is now in our stores at Tamatave. "We did not deliver the case to the plaintiff "in this action because it was claimed by the "Ouest Maritime Company of France for "whom we were agents."

There can be no doubt therefore from the evidence tendered by the plaintiff that he holds the right of Marday Mootoo with regard to the case shipped in March 1882 on board of the *Argo* and now in the store of the defendants, that the case is really marked J A N instead of M. M. and that if no other person has a better claim to it there is no reason why it should not be delivered to the plaintiff.

The defendants on the merits now say that when the case marked J. A N. arrived, one Mr Dupuy at first took delivery of it but finding that it did not belong to him he returned it, that Marday Mootoo also claimed it but as the bill of lading produced by him did not bear the initials J A N they refused to deliver it to him; that shortly afterwards one Appasamy in his turn claimed the case and produced to them the same bill of lading on which the initials J A N, had been added opposite the entry of the case, shipped and at the foot of which Marday Mootoo had signed a delivery order to Appasamy and Co, that having suspicions they refused the delivery to Appasamy as they had done previously to Marday Mootoo, but that the bill of lading having been transferred to Appasamy & Co before the plaintiff obtained a judgment of the District Court of Mauritius upon which his claim is grounded, it is not possible for the defendants to admit Plaintiff's claim.

It may be observed that the defendants do not now say, as Mr. Proctor did in the affidavit quoted above and in his deposition before the Master, that the case was not delivered to the plaintiff because it was claimed by the "Ouest Maritime Company. We do not wish to attach too much importance to this contradiction in the reasons of defence because Mr. Proctor having lived in Mauritius for many months since 1882 may have forgotten the details of the matter upon which he was examined. Still it was a different issue that was raised at the last moment by additional pleas and we have now to deal only with the question of the rights of Appasamy upon the case J A N. The defendants call the delivery order written at the foot of the bill of lading by Marday Mootoo a transfer of the ownership of the bill, and it was argued that in the absence of Appasamy the Court could not decide whether the rights of the plaintiff were better than his; there is no doubt that if the words written by Marday Mootoo were equivalent to a regular and complete endorsation, Marday Mootoo would have transferred his rights to the ownership of the bill to Appasamy and this latter having a conflicting claim should have been made a party to the present action, but after reading the words written at the foot of the bill, we are of opinion that they are equivalent to a mandate given by Marday Mootoo to claim the case for him and not to a transfer of rights—the attitude of Appasamy since March 1882 would tend to show that he understood it to be so, for no attempt appears to have been made by him since that time to obtain the delivery of the case. We must therefore hold that the plaintiff being, by the judgment of the District Court coupled with the other documents produced, the holder of the rights of Marday Mootoo to the case J A N is alone entitled to claim it, and we do hereby condemn the defendants to deliver it to him forthwith after this judgment shall have been regularly brought to

their notice at Tamatave, failing which to pay to the plaintiff the sum of eight hundred rupees being the value claimed for the case.

We also condemn the defendants to pay the costs of this suit, except the costs of the application for parole evidence which shall be borne by each party, the applications having been given up in Court by both parties. We are of opinion that the costs should be borne by the defendants personally in this case, they were not sued in a representative capacity but personally, besides it does not appear that they had the authority of the "Ouest Maritime Company" to resist the plaintiff's action as they did, and having failed as well on their preliminary objections as on their defences on the merits they must be condemned to pay the costs personally in the first instance leaving them to exercise their recourse, if any they have, against the "Ouest Maritime Company."

SUPREME COURT

SEPARATION A MENSA ET THORO—INJURES GRAVES—DEMAND GRANTED.

The petitioner prayed for a judicial separation a mensa et thoro from her husband, on the ground of desertion and injures graves.

The Court considered that as the parties had lived apart by mutual consent, there was here no desertion in the legal sense of the word; but that the indecent and coarse language used by defendant in so many instances being in no way warranted by the conduct of the plaintiff, amounted to "injures graves."

A sentence of judicial separation in favour of Petitioner was granted with costs.

POILLY the wife.—Plaintiff

versus

POILLY the husband.—Defendant

—
Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

**His Honor E. DIDIER ST AMAND,— Acting
Puisne Judge**

G. GUIBERT,—Counsel for Plaintiff,

F. ROBERT,—Attorney for the same.

A. HUGUES,—Counsel for Defendant,

E. HUTEAU,—Attorney for the same.

Record No. 23,342.

26th May 1886.

The plaintiff in this case Eulalie Martin the lawful wife of Louis Ernest Poilly, prays the Court to grant her a judicial separation *a mensâ et thoro* from her husband.

The petition of the plaintiff alleges both desertion and “injures graves”.

With regard to the desertion, after hearing the evidence adduced in the case we have already expressed the opinion that if it was shown that parties had lived separately and with little concern on either side as to what became of the other, it was also established that they did so by a sort of mutual consent which precluded the idea of abandonment in the legal sense of the word “desertion.”

With regard to the “injures graves,” it is proved that parties married in 1854 and that after six or seven years of comparatively happy life together, defendant, if he did not get drunk, was but too often under the influence of liquor, that after he ceased to be a school

master defendant had no regular employment and when earning some money spent very little of it in the wants of the house. Their home was so poor that the little girl had to be clothed and educated at the expense of a neighbour and either through drink, though not carried to drunkenness, or from the pinches of poverty, Poilly the husband often used abusive language to his wife, no doubt such disgraceful language often originated in in money quarrels and was not confined to the secrecy of the wretched home of parties. This deplorable state of things lasted for years and although a sort of apparent reconciliation took place at the time of the marriage of the daughter about two years ago, it was shortly followed by a renewal of the coarse language above referred to, and one witness told us that since Mrs. Poilly had inherited some property from her mother, such disgraceful scenes have not merely increased but are continual.

We could not read over the evidence heard by us without coming to the same conclusion as Poilly the son, namely that plaintiff and defendant cannot live together and that all attempts at reconciliation would prove as fruitless now, as they had done in the past.

The indecent and very coarse language used by Poilly the husband, in so many instances and having latterly become habitual, amounts to “injures graves”; such language was in no way warranted by the conduct of Mrs. Poilly, we do not find in the evidence any proof that in suing for a “separation de corps” Mrs. Poilly is actuated by the sole wish to deprive her husband from sharing with her the little she has inherited from her mother.

We cannot therefore adopt the conclusions of the Ministère public, and grant a decree “*nisi*” with costs.

After further examining the question of the form of Judgment in this matter we think that instead of a decree nisi the judgment of the Court should be a sentence of judicial separation in favor of the plaintiff with costs.

SUPREME COURT

DEMAND FOR A SEPARATION OF GOODS AND PROPERTY—DEMAND GRANTED.

The plaintiff claimed a judgment ordering that she be separated as to goods and property from her husband and that defendant be ordered to pay her all her reprises.

The Judgment was granted.

C. D'ARIFAT THE WIFE,— Plaintiff
versus
C. D'ARIFAT THE HUSBAND, Defendant

Before

His Honor F. C. WILLIAMS,— Puisne Judge
and

His Honor E. DIDIER ST. AMAND,— Acting
Puisne Judge.

W. NEWTON,—Counsel for plaintiff,
H. LECLÉZIO,—Attorney for the same
L. ROUILLARD,—Counsel for defendant
C. ROUSSET,—Attorney for the same

Record No. 23458.

26th May 1886.

In this case Louise Adélaïde Marie Koenig, who was married to Jean Pierre Charles Labauve d'Arifat under the system of community

of goods and property prays for a judgment of the Court ordering that she be declared separated as to goods and property from her said husband and that defendant be condemned to pay back to her all her claims "reprises". The formalities required by law having been fulfilled and the "ministère public" abiding by the decision of the Court, we grant the separation as to goods and property prayed for.

SUPREME COURT

CLAIM OF CERTAIN SUMS DUE BY A PAY CLERK TO GOVERNMENT.—ACCOUNTS FILED ON BOTH SIDES.—OFFICER WHO PREPARED ACCOUNT DIES.—COURT REFUSES TO RECEIVE ACCOUNT IN EVIDENCE.—BOOKS OF ACCUSED TAKEN BY GOVERNMENT WITHOUT INVENTORY.—BOOKS HAVE DISAPPEARED—DEFENDANT COMPLAINS THAT HE CANNOT UNDER THE CIRCUMSTANCES ESTABLISH THE PAYMENTS MADE BY HIM.—COURT REJECTS ITEMS CONCERNING CANTREIN ACCOUNTS.—DEFENDANT MUST ESTABLISH PAYMENTS MADE BY HIM TO ATTACHING CREDITORS.—EXPLANATIONS AS TO FIGURES ON BOTH SIDES INCOMPLETE.—A MORE MINUTE INVESTIGATION NECESSARY.—CASE REFERRED TO MASTER.—COSTS RESERVED.

Plaintiff alleged that defendant when he was pay clerk of the Police Department received certain large sums of money, and that he has not accounted to Government for a sum of Rs. 8907.42, in the manner and form and for the causes explained and set forth in the account.

The defendant denied being indebted to Government in any sum whatever, and the plaintiff subsequently reduced his claim to Rs. 8,165.56 c.

The Government in support of its claim produced two reports, with numerous annexures, prepared by certain government officers; but the officer who played the principal part in collecting the information died before he could be heard on oath in Court and the others seem to have relied upon the correctness of the data and of the figures of that officer.

The Court was of opinion that they could not consider that report as evidence, under such circumstances.

The Court also remarked that if Government had had an inventory of the books and papers of the defendant made in his presence on the day of his suspension, the defendant could not, as he was now doing, complain of the difficulty of explaining payments alleged to have been made by him through these books and papers having been taken possession of and lost by some Government official.

The Court rejected at once a certain claim concerning a canteen account, because any money that the defendant might have received under that had been received not for the plaintiff, but for the Canteen.

On the other hand, the Court ruled that defendant was bound to account to Government for certain sums deducted by him from the pay of members of the Police, on account of attachments lodged, and to establish that these sums had been paid to the attaching creditors.

The Court finding that the explanations of both plaintiff and defendant were incomplete as to the figures of the accounts filed on each side, considered that a more minute investigation into the value of those figures was indispensable. The case was accordingly referred to the Master for that object, with full power to call, if necessary, for the assistance of an accountant.

Costs reserved.

COLONIAL GOVERNMENT,— Plaintiff

versus

LATOUCHE,—Defendant

—
Before

His Honor E. J. LECLEZIO,—Chief Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge

—
The Substitute Procureur General,—Counsel for plaintiff

J. GUIBERT,—Attorney for the same

W. NEWTON,—Counsel for defendant

E. LAURENT,—Attorney for the same

—
Record No. 22577.

—
28th May 1886.

The defendant in this case was charged as pay clerk of the Police Department with having committed certain offences; with the view of his suspension from office at a meeting of the Executive Council held on the second september 1881, the Committee advised that the defendant be suspended from office and salary, and he was suspended by direction of the Lieutenant Governor Sir Napier Broome. Afterwards, in the month of August 1884, a declaration was served at the request of the Colonial Government upon the defendant, in which the plaintiff alleged that the defendant when he was pay clerk of the police department did receive from the Colonial Secretary the several sums of money mentioned and described in an account tendered for the causes therein specified and remained debtor of the Colonial Government on 17th March 1881 in the sum of Rs 8907.

in the manner and form and for the causes explained and set forth in the account.

The plaintiff further alleged that, even after deducting from the above sum the sum of Rs 5000 being the amount of the security Bond for which the London guarantee and accident Company Limited is answerable towards the plaintiff, the defendant would still remain the debtor of Government in the sum of Rs 8907.42 c. and the plaintiff demanded that the Court should decree that the defendant is lawfully indebted to the plaintiff in the sum of Rs 8907. 43 c. by virtue of the account above stated and for the causes therein mentioned and to condemn the defendant to pay the plaintiff the above sum, the defendant being entitled to deduct from the sum so recovered the sum of Rs 5000 being the amount of the security Bond already mentioned.

The defendant in his plea denied being indebted to the Government in any sum whatsoever.

After the pleadings had been filed, the plaintiff had a new account prepared from which it results that the sum now claimed from the defendant amounts to Rs 8,165.56 c. In support of this claim, the plaintiff had produced two reports, together with numerous annexures prepared by certain government officers deputed to the effect of examining into the defendant's case in 1881 and in 1885, books and other documents were also put in evidence and several witnesses heard. Mr. Snelling, one of the officers who signed the first report dated the 26th July 1881, is now dead, he appears to have played the principal part in collecting the information and in preparing the statements and figures upon which the report is based and his testimony would have been most valuable. Mr Martin and Brown seem to have mostly relied upon correctness of the data and of the figures

of Mr Snelling. Under these circumstances it was argued on behalf of the defendant that the Court could not accept as competent evidence the reports produced. After carefully examining the report of the 26th July 1881 we have come to the conclusion that we could not consider it as evidence, it contains the opinion of certain officers upon the circumstances of the defendant's case, it was made partly from documents and partly from evidence of parties not upon oath, and the oral evidence of Messrs Brown and Martin called to back it does not appear to us sufficient to enable us to rely entirely on the accuracy of the statements and the correctness of the figures contained in it—and we are the more disposed to adopt that view when we read at the end of the additional report signed by Brown and Martin on the 6th November 1885 the following words which show that they did not tread on very firm ground in 1881 “ Mr Mouna has called our attention to the fact that, although in the absence of the deduction sheets and other documents mentioned in the preceding paragraph, the exact amount due by Mr. Latouche to the “Reward Fund” cannot be ascertained, yet there are certain items which it may be possible to ascertain, viz: Hospital dues, Canteen expenses, Library subscription and Messing expenses and if these can be ascertained then Mr. Latouche should be credited with such amounts and they should be deducted from the Rs 1,901.63 appearing under item 17 of Mr. Ferré's statement as above mentioned,” considering that this remark is a fair one, the matter being now pending before the Supreme Court, we beg leave to suggest a reference to the Honorable Procureur General in order that he should advise whether it be not necessary to have statement B No. 9 revised, as suggested by Mr. Mouna in which case it may be desirable to issue instructions to the Audit Office, as soon as possible to make such revision”.

Then No. 22 in Mr. Ferré's statement should be deleted as it appears in statement B. No. 9.

Mr. Mouna, the clerk of the agent of the London Guarantee Company who was examined as a witness for the plaintiff has declared to the Court that he was not satisfied that there was a deficit in the absence of books and of complete information.

This leads us to the point taken on behalf of the defendant that his books having disappeared, it is next to impossible for him to prove that sums now claimed from him have been really paid and employed as they should have been, that there were several books kept by the defendant himself and by several witnesses most of whom are still in the employ of Government, those books have disappeared but they were in the office at the time of the defendant's suspension, they were taken by Mr. Snelling to examine the defendant's case and they are not to be found now; the defendant himself never returned to his office a few days after his suspension and there is no evidence that he took away any book from it, we think that if Government had had an inventory of the books and papers of the defendant made in his presence on the day of his suspension, the defendant could not have complained of the difficulty of explaining his payments, but in the absence of such inventory and with the proof that we have of the existence of certain books at the time of the defendant's suspension, the court cannot be easily satisfied with approximative statements prepared for the plaintiff and it can rely only on figures sworn to by witnesses as being correct and taken from reliable documents.

With regard to the deduction sheets previous to May 1880 it appears that they were destroyed by the defendant, but he says that he destroyed them in the usual course as with other useless papers seeing that they

were not ordered to be kept by the standing rules, he adds that it was the custom of the office to destroy old deducting sheets and that he only followed what his predecessors had done, and that, besides, information as to the deductions may be obtained from the other books of the establishment. The defendant's evidence as to the destruction of old deduction sheets by defendant's predecessors is confirmed by that of Mr Lebon a teacher who was in the police department from 1876 to 1881—but there is no evidence as to the time at which the defendant destroyed the deduction sheets which might throw much light upon his book keeping in the latter part of 1879 and the beginning of 1880 and doubts unfavourable to the defendant must necessarily arise from that circumstance, because, several months before he was suspended his attention had been called by queries from the Audit office to the state of his book keeping, and he must have known that he was suspected of having committed irregularities in his accounts. Another important point has been argued before us. Is the defendant bound to account to Government for the deduction made in favour of the Canteen? for the plaintiff it was said that the defendant was bound to account because the money had been entrusted to him as a Government servant. From the evidence it would appear that the police canteen was a sort of association of the members of the police force which received a grant from Government and that the accounts of the Canteen were examined to see whether the grant was properly employed, the Canteen had a separate account of its own at the bank and a separate clerk, that clerk was prosecuted about the time of the defendant's suspension for embezzlement of money belonging to the Canteen. The sums deducted from the pay of the men were to be paid to that clerk but the man gave an acquittance to the pay clerk of the police department for the whole of

their pay. Was the pay clerk the mandatory of Government after he had deducted the money or was he then acting on behalf of the Canteen association? After examining this question, we are of opinion that the Government has no right to sue for the sums deducted from the pay of the men in favour of the Canteen; if it were so the Government would be responsible to the Canteen for all sums appropriated by the pay clerk and we do not think that such was the understanding between the government and the Canteen of the police force, at the time that a grant was made to assist the latter. We think that the pay clerk when making the deductions from the pay of the men according to the notes given to him by the Canteen clerk, was acting as the mandatory of the Canteen and not of the Government and that if he, the pay clerk, can show that the men gave an acquittance for their full pay, he is no longer responsible to Government, and he is not bound legally to account to the Government for such deductions; we think that the sums deducted with the consent of the men belonged to the Canteen and that defendant was the custodian of those sums, not for Government, but for the Canteen.

As to the item for retentions on account of oppositions, we cannot share the opinion expressed by the learned Counsel for the defendant that, no claims existing at present as to oppositions, the Government should wait until they are made and then call the defendant in guarantee, we think that, if the plaintiff can show that retentions were really made on account of oppositions, the defendant is bound to prove that the creditors of the members of the police force have received those sums. The Government owing money at present to the defendant for his salary is entitled to have the matter settled now in order to be able to oppose a set off, if any, to

the defendant; on the other hand the defendant says that his opposition book having disappeared, it is difficult for him to prove the payments made by him to the attaching creditors.

This circumstance may be taken into account to a certain extent when the correctness of the figures of this item will be enquired into. After determining these several issues, we have tried to come to some conclusion with regard to the balance of the account before us. On the one hand we had the evidence of Mr. Ferré upon that account and on the other the evidence of Mr. Arnulphy, who has also filed an account as part of his deposition, which shows a balance in favour of the defendant; but we find the explanations as to the figures incomplete on both sides and upon the whole, we think that we should not be doing justice to this case if we were to decide it now without a more minute investigation into the value of the figures of both of these accounts, and we refer this case to the Master, who will examine the accounts in presence of the parties in accordance with the views expressed by us in the judgment. Full power is hereby given to the Master to call for the assistance of an accountant, if need be, and also to allow additional evidence both oral and documentary enabling him to make a complete report to the Court. Costs reserved.

SUPREME COURT

BRITISH RESIDENT EXPULSED FROM MADAGASCAR— PROTECTION OF BRITISH FLAG WITHDRAWN BY VICE-CONSUL— ACTION IN DAMAGES— POWERS OF A VICE-CONSUL— TREATY BETWEEN ENGLAND AND MADAGASCAR 27TH JUNE 1865— ORDER IN COUNCIL OF FEBRUARY 1869— SENTENCE AND ACT OF EXPULSION IRREGULAR—

him by force if he remained longer, he left the capital on the second day of August eighteen hundred and eighty four.

Consular jurisdiction as regards British subjects in Madagascar, is regulated by the Treaty between Her Britannic Majesty and the Queen of Madagascar, of the 27th June 1865, and by Her Britannic Majesty's Order in Council of February 4th, 1869. Article 11 of the Treaty, SS 1 and 2 runs as follows :—

“ Her Majesty the Queen of Madagascar agrees that in all cases where a British subject shall be accused of any crime committed in any part of her dominions, the person so accused shall be exclusively tried and adjudged by the British Consul or other officer duly appointed for that purpose by Her Britannic Majesty. But any British subject whom the British Consul or other officer shall find to have been guilty of having openly offended against the laws of Madagascar shall be liable to be banished from the country.”

“ In all cases where disputes or differences shall arise within the dominions of the Queen of Madagascar between British subjects and the subjects of Her Majesty the Queen of Madagascar, Her Britannic Majesty's Consul or other duly appointed officer, aided by an officer duly authorized by Her Majesty the Queen of Madagascar shall have power to hear and decide the same. ”

Sections 15 to 18 of the Order in Council recite the circumstances under which a British subject found guilty of crime may be deported, and the manner in which the deportation is to be conducted.

The Plaintiff's first point in the action before us is that the Vice Consul had no jurisdiction to try him, no such functionary as a Vice Consul being expressly mentioned either

in the Treaty or in the Order in Council. Article 11th of the Treaty declares the Judge of the Consular Criminal Tribunal to be the British Consul “ or other officer duly appointed for that purpose by Her Britannic Majesty ;” and the Order in Council although its sections refer always to the “ Consul ” as the Judge, explains by section 34 that the term “ Consul ” shall include “ every person duly authorized to act in that capacity within the dominions of the Queen of Madagascar. ” The simplest definition of a Vice Consul, and the one which we are inclined to adopt, is that of *Wharton's Law Lexicon* which describes this functionary as “ one who acts in the capacity of Consul ” and, as we are satisfied upon the evidence that the defendant was duly authorized so to act for England within the Queen of Madagascar's dominions, we think that section 34 of the Order in Council gave him jurisdiction, and that it was intended to endow the Vice-Consul, within the limits of his Vice Consular District, with the judicial power of the consul as given by the Order in Council.

It is next urged that the Plaintiff was convicted of no crime for which the Treaty or Order in Council prescribes the penalty of expulsion or deportation. According to section 15 of the Order in Council, that penalty may attach to a conviction for openly offending against the laws of Madagascar or to a second conviction before the Consular Court for any crime, if after such conviction, the person convicted shall be unable to find good, sufficient, and satisfactory security for future good behaviour. This is an amplification of article 11 of the Treaty which gives only open offence against the laws of Madagascar as a ground for expulsion, and makes no mention of furnishing security as an alternative for it. It does not appear to us that the offence of which the Plaintiff was convicted falls within the general terms of the Treaty, or within

those of section 15 of the Order in Council. He seems indeed to have been charged by the Hova Government with an open offense against law 4 of the Malagasy Code, viz : the offense of striking or wounding with intent to kill. But he was found guilty and fined for the lesser offence of unintentional wounding, an offence which appears indeed to have no place at all in the Criminal Code of Madagascar. It was, moreover, the Plaintiff's first, and not his second, conviction before the Consular Court. Section 16 of the Order in Council, however, empowers the Consul, even in the case of a first conviction before him for certain offences—amongst others stabbing or wounding or any assault "endangering life"—to cause the offender in addition to fine or imprisonment, to be sent out of the country for a certain fixed time, according to the manner pointed out in section 15. It is urged from the context of this section, as well as from the nature and scope of the Malagasy law first referred to, the "wounding" of S. 16 is an intentional wounding, whereas the Vice-Consul in this case convicted the Plaintiff of wounding unintentionally.

Upon this point we do not think it necessary to express an opinion ; because, after mature consideration, we have come to the conclusion that, so far as the Order in Council is concerned, the sentence and the act of expulsion in this case were irregular and illegal. The judicial President of the Consular Court did not as a matter of fact, pronounce a sentence of expulsion under any section of the Order at all ; but merely appended to his sentence of fine an intimation that the continued residence of the Plaintiff in the country would be placed at the disposal of the Queen of Madagascar and the Consul. But the Consul's opinion was not given in the matter, the provisions of § 15 as to the manner of deportation were not followed at all, and no report of the proceedings in the Consular Court was addressed to the Supreme Court of this Co-

lony in accordance with the positive requirements of § 18 of the Order in Council in all cases of deportation. What the defendant actually did was to invite the Hova Government's opinion as to whether the Plaintiff should be allowed to stay in the country or whether he should be forced to leave it ; and then, when that opinion was adverse to the Plaintiff, to insist upon the Plaintiff's leaving by a certain date, in accordance with the Hova Government's request, under a threat of withdrawal of the British Flag's protection. Such a course of procedure is certainly not contemplated by the Order in Council, which is perfectly specific, as indeed it ought to be in so grave a matter, both as to the source from which the order of expulsion is to emanate, and as to the method in which the act of expulsion is to be carried out. Under section 16, the Vice Consul might, according to our view, have a discretionary right to pass sentence of expulsion, but we search in vain for any section of the Order which authorizes him by his sentence to delegate that discretionary right to another and an alien power, and to use his consular authority as a mere mandatory of that power for carrying its wishes into effect.

It may be remarked that, in this matter, the subjects of the United States Government would seem to stand in a different relation to the authorities of Madagascar from British subjects. Section 24 of Article 11 of the treaty of 1867 between Madagascar and the United States states that if a citizen, having been convicted of several minor offences, has proved himself to be turbulent and intractable, he shall be banished *on the request of the Government of Madagascar*. It is, moreover, of course, conceivable that out of consideration for that *salus populi*, which is the *suprema lex*, a consular officer to whose protecting care the interests of his fellow-subjects in a foreign country, might feel bound to withdraw, and

might be justified in withdrawing, that protection from the one, in order to secure the safety of the many. The circumstances of the case before us were certainly peculiar and exceptional. In the capital of a semi-civilized country, at war with a European state, were a handful of Europeans surrounded by a population, numbers of whom did not know their European friends from their foes; and there was a prospect that, as the operations of the French progressed, and as the capital was closely threatened, any indiscretion on the part of foreigners, or the mere repetition of such a rash act as that which the plaintiff had undoubtedly perpetrated, might result in a popular rising against European residents in general.

If, in the clear apprehension of such a probability, the Malagasy Government had felt itself impotent to protect foreign residents so long as one particularly objectionable foreign resident remained, and if on this ground it had appealed to the Consul to assent in this case to the plaintiff's expulsion as the sole guarantee for security to the lives and protection of other British or European residents, the Vice Consul's discretion might have been wisely exercised in expelling the Plaintiff according to law, or in assenting to his expulsion by others. But this was not the clear case of the Hova Government as against the plaintiff. From first to last, as the correspondence before us shows they appear to have considered him as the perpetrator of a "great crime,"—an offender against that law of theirs which prescribes the death penalty for the offence of wounding with intent to kill,—the charge which was certainly made, but upon which the plaintiff as a matter of fact had been most certainly acquitted. So that, no high ground of moral necessity for the defendant's action is apparent to us, upon which we can say that the technicalities of Orders in Council and treaties, in this matter, might

well be disregarded in an appeal to such a tribunal as our own. It may be that, in the interest of peace and quietness, and of the well being of the European community in its relations with the surrounding Malagasy, the Plaintiff, who described himself, even after the event of the third of July, as one whose "social, religious and political instincts" are totally opposed to those of his English fellow countrymen, missionaries and "others, by whom he is surrounded" was better out of the country and the capital than in them. It may or may not be that his conduct and character would have justified the Vice Consul in regarding him as "turbulent and intractable," to use the words of the United States Treaty, and so as a fit subject for banishment after conviction. But in that case the defendant should have proceeded strictly in the manner prescribed by law. He did not so proceed; and it is for this reason that we regard the plaintiff as entitled to a verdict, on the ground that, while the defendant might have exercised his discretion to expel him in due form of law, he was the author of, and a party to, a method of expulsion which was irregular and unlawful.

But having reached this conclusion, we do not feel that we can go a single step further. The plaintiff insinuates that his expulsion was really attributable to his hostile attitude towards missionaries, and to his repeated criticisms of their doings in the press. In his correspondence with the Hova Government, he seems to hint that it is not the Government, which is in truth hostile to him in this matter while, if the defendant is to be believed upon his oath, Plaintiff stated to the defendant after the command to leave had been addressed by the defendant to him, that "he was ready to admit that there were things behind which, if known, would justify the defendant's apparent harshness." What we desire to express in this judgment is that

there is no satisfactory evidence to our minds of any malicious design to injure the Plaintiff on the part of the defendant, whereas, the plaintiff's conduct in the matter of the shooting seems to us to have been culpably rash, and his attitude afterwards to have afforded no sort of inferential guarantee against the perpetration of a similar indiscretion, which might be attended with very much more serious consequences. Though we do not know all that passed between the Defendant and the Hova Government, it is to be remarked that the Malagasy Foreign Secretary of State, in his letter to his agent the witness Proctor, expressly denies that Mr Pickersgill used any influence with the Hova Government to demand the plaintiff's expulsion.

Subsequent to that event the Plaintiff himself wrote to the defendant on several occasions in terms of good feeling and even of confidence. It is much more recently that vague threats of revenge upon the defendant Pickersgill "or some other missionary as the result of the entire business are held out by the plaintiff in his letter to a third party. He wrote to the defendant from Mauritius on December 23, 1884: I feel in my bones that unless this affair is justly settled it will have a tragic ending for some of us. Do not drive me to extremities."

Upon a view of all the circumstances, then, we see no ground for giving indirect damages, to the plaintiff; and, as to direct damages, evidence fails to substantiate the plaintiff's claim. The defendant when examined before the Commissioner said "I went to see the Foreign Secretary and requested him not to take any action before the date fixed by Mr. Wilkinson for his departure, as I did not wish to see him expelled, but leave of his own accord, as he had publicly declared that such was his intention. The delay asked for was granted to me." And later on he says: "The

"reason for my saying in my letter of the twenty second of July that I should be obliged to withdraw the protection of the British flag from Mr. Wilkinson, was because I was informed verbally by the Foreign Secretary that he would send down soldiers to turn out Mr. Wilkinson by force, a course which might have resulted in an *émeute* most disastrous to European interests in the capital." As a matter of fact, from the very commencement of the year 1884, the Plaintiff had announced his impending departure in the columns of the "Madagascar Times", and though he tells us that such advertisements were merely baits thrown out to attract customers to his sales, we cannot but observe that, as for instance in an advertisement in the "Madagascar Times" of May 28-1884, he refers to his departure as imminent. He "has decided to leave a country undermined by the intrigues and party spirit of a majority of the foreign residents." And before the shooting on July 3rd took place, he had actually fixed and advertised a definite day, July 20th, for his leaving the Capital. We observe, moreover, that he continued advertising that fixed day from week to week in the columns of this paper, and that when he really left, under the pressure of which he complains, that date was actually exceeded by a fortnight. In a letter to the defendant of July 18th 1884, plaintiff wrote: "You know perfectly well, that, long before the event of July 3rd, I had decided to leave, and am leaving Madagascar," and in appealing to the Madagascar Foreign Secretary on the 26th of July, the plaintiff wrote: "Long before the Vice Consul's order (for departure) came, I had made arrangements for leaving on business..."

"I respectfully petition Her Majesty to let me have time to wind up my affairs.

"Two or three days may be sufficient, and
"if so I shall only be too glad to go."

In the light of these announcements and statements, the claim of the plaintiff for direct damages seems to us to be exaggerated and untenable; and, though we consider him, upon the point of the illegality of his sentence, as entitled to our verdict, we can accord to him only nominal damages.

Judgment will be for the plaintiff; (Rs. 20.00c.) twenty rupees damages with costs.

SUPREME COURT

APPEAL FROM A JUDGMENT OF A MAGISTRATE
CIVIL SIDE—REASONS OF APPEAL NOT FILED WITHIN FIVE DAYS—DIES NON—CIRCULAR DOES NOT MAKE A DIES NON—MAGISTRATE IN TOWN—APPELLANT AT FAULT—DELAYS OF APPEAL PEREMPTORY—APPEAL DISMISSED WITH COSTS.

A circular stating that Monday the 19th day of April would be considered a public holiday for the Government officials was sent to the several Courts of Justice and thereupon the appellant whose last day it was to appeal from a decision of a District Court, postponed doing so till the following morning.

The Court ruled that a working day could not be converted into a dies non by a circular, and that as the appellant, as shown by certain affidavits, might have found Magistrates in town on that day had he carefully looked for them in order to file his reasons of appeal, he was out of the peremptory delays fixed by the Ordinance.

The appeal was dismissed with costs.

PENDOO—Appellant

versus

LUTCHMAN—Respondent

Before

His Honor E. J. LEOLÉZIO — Chief Judge

and

His Honor A. MURE — Puisne Judge

T. L. JENKINS—Counsel for Appellant

P. F. LASTELLE—Attorney for the same

F. MATHEWS—Counsel for the Respondent

A. DE COMMARMOND—Attorney for the same

Record No. 862.

28th May 1886.

"Judgment on preliminary objection to
"appeal taken by Counsel for respondent on
"the ground that the notice of appeal was
"not served upon the District Magistrate
"within the statutable delay of office days."

His Honor Mr. Justice Mure (after their Honors had conferred on the Bench :

The Court does not think it necessary to take this case into further consideration. The principle of law applicable to appeals from judgments of inferior Courts, is, in all countries, so far as I know, that the delays which are allowed to the party appealing are peremptory; if those delays are exceeded, it is impossible for the party then to appeal. That principle has been established I think in almost every Court in the United Kingdom and it is also well established in the proceedings of this Court. In the present instance the judgment had been delivered upon the 13th of April. The delay within which to appeal allowed to the appellant was five days. The notice of appeal ought therefore to have been filed on the 18th of April. As the 18th was a Sunday it ought to have been filed on the 19th, but it was not filed until the 20th of April; now it is said in explanation of that

delay that the 19th of April was a *dies non*. The law has fixed certain formalities which are to be observed in order to create a *dies non*. There must be a proclamation by the Governor and the proclamation must appear in the Gazette.

In this case we find that no such formalities were attended to.

We cannot, therefore, consider that the 19th day of April was a *dies non* or that it should have been considered so by the Courts of Justice to whom a circular stating that the day would be observed as a public holiday for Government officials, was sent. Courts of Justice have certain duties and certain acts to perform upon special days, they cannot know whether some of them will have to be performed on a particular day or not, and they ought not have considered the circular a sufficient reason for treating the day as a public holiday. We therefore think that as this appeal was only filed on the 20th of April it is the duty of the appellant to satisfy the Court that it was impossible for him to file this appeal upon the 19th. We think that nothing short of a physical impossibility will entitle us to get over the principles of the law which are applicable to this kind of proceeding and the question is whether upon that day it was impossible as a physical fact for the appellant to file his appeal. It happens that we have affidavits in this case on both sides, but we have an affidavit of the acting senior District Magistrate who says that he was in his Court until 11 o'clock and that he was in Port Louis until 5 o'clock in the evening. Now here was an appellant whose duty it was to get his appeal received on Thursday, one of the proceedings necessary to enable him to prosecute his appeal. I do not think and I believe my learned brother concurs in that view—that the appellant has proved here that which will enable him to get the better of his duty, name-

ly that on that day it was physically impossible for him to file his appeal with a Magistrate.—He may have supposed that he ought to file his appeal with the senior District Magistrate but not only was it possible for that Magistrate to receive the appeal but it was equally possible for the junior District Magistrate to do so. It is perfectly clear that though there may be a separation of the duties of these magistrates into Civil and criminal business, for that is a mere administrative separation, the functions and the rights of those Magistrates to perform the duties attached to the office are the same in both cases.

It would have been competent therefore for the junior District Magistrate, Mr Lapeyre, to have received this appeal and to have ordered recognizances to be lodged, and in his affidavit he says he was there during the greater part of the day. Now an argument has been addressed to us that that does not mean the whole day. I am not much impressed by that argument because it seems to me that it was the duty here of the appellant to find out the Magistrate.

The Magistrate is not bound to remain there for every minute in the day upon the supposition that a judgment of which he knows nothing may be appealed against on that day. It is for the appellant who has the work to do, to find out the magistrate,—to get hold of him wherever he may be and to get him to do the work that is wanted. Therefore, I am not moved by the argument of Mr Jenkins that Mr Lapeyre was not in his Court for the whole of the working hours of that day. It seems to me that he was there quite enough to cover the time during which the appellant could have lodged his appeal, as he says in his affidavit he wanted to do; to wit: at 11.30 and at 1 o'clock in the day—My view is that if the appellant had gone about his duty in the right manner, if he had

justly appreciated the nature of the duty he had to perform he would not have been contented with merely one visit to one magistrate but he would have also gone to the other next door, where the business could equally have been done. But he does not seem to have waited, and in the circumstances of the case, the Court, I think, is bound to hold that this appellant has not done fully that which he ought to have done in endeavouring to lodge his appeal on the last day on which it was competent to lodge it. The Court therefore rules that this appeal be dismissed.

Appeal dismissed with costs.

SUPREME COURT

GOODS REMOVED BY VIOLENCE AGAINST THE WILL OF THE OWNER—STRANGE CIRCUMSTANCES UNDER WHICH THE ALLEGED REMOVAL TOOK PLACE—DEFENDANTS PLEAD THAT GOODS WERE TAKEN IN PAYMENT—PLAINTIFF'S CASE NOT ESTABLISHED—NON SUIT WITH COSTS.

Plaintiff asked the Court to decree that the defendants in this case had by violence and against his will, in broad day light, close to a Police station, in the midst of a populous village, removed and stolen all his goods from his shop and carried the same to another building belonging to them. Caption of the body was moved for under Ord. 16 of 1869.

The Court considered that the plaintiff had not made out his case and directed a non-suit with costs.

JEDDY—Plaintiff

versus

MOOSSAJEE & OTHERS—Defendants.

Before

His Honor E. J. LECLEZIO,— Chief Judge
and

His Honor E. DIDIER ST AMAND,—Acting
puisne Judge.

L. V. DELAFAYE,—Counsel for plaintiff,
E. SAUZIER,—Attorney for the same.

T. L. JENKINS,— Counsel for defendant,
F. SIMONET,—Attorney for the same.

Record No. 23501.

10th June 1886.

In this case plaintiff alleges that on the 19th of April last, the goods in his shop situate in the village of Rose-Hill have been unlawfully, illegally and fraudulently carried away by the defendants and he prays the Court to decree 1o. that such goods and stock in trade, now in the possession of the defendants are his property and have been fraudulently removed by them.

2o. To order the defendants to restore the said goods to plaintiff and in default to pay the value thereof and plaintiff further prays that the above judgment be enforced by caption of the bodies of defendants in terms of Ordinance No. 16 of 1869. The Court has to decide here a question of fact. Plaintiff wants us to admit that in the day time, in the midst of a populous village, within a few paces from the police station all the goods of his shop were removed by defendants against his will and by force. To establish these facts, it is not sufficient to show that on the nineteenth of April the goods of plaintiff have been transferred by defendants from his shop to another building and that later on in the day he sent telegrams to some of his creditors in Port Louis to complain that his goods had

been so taken away against his will. It would have been necessary to prove that plaintiff resisted such violence, (if any) and when unable to do so himself called in the assistance of the Police or of his friends and neighbours.

It is alleged by plaintiff that the Inspector of Police and other members of the Force were absent on account of the opening of the new Legislative Council. Such fact might easily have been proved by the Inspector himself and the police station being open day and night, plaintiff might have shown that he really did apply to the person in charge for advice and assistance which were only withheld for want of men: and here it may be said that the evidence of the constable or peon whose name has been mentioned to the Court might have thrown more light on this case and is a missing link. Admitting the impossibility of obtaining the help of the Police at that particular moment on the 19th, it may be asked, why plaintiff did not seek early the next day the assistance of the police or the advice of the Magistrate? Plaintiff also relies on the evidence of Ibrahim Ismaeljee Mal one of his creditors, telegraphed to by him. But if this witness proves by the admission of the defendants themselves that they took the goods in payment, he does not establish that they did so against the will of plaintiff.

The removal of the goods cannot be denied, but the defendants give what seems a plausible explanation of their conduct—contradictions no doubt exist in the evidence adduced on either side, but it is for the plaintiff to make out his case, and on the whole it cannot be said that he has made a satisfactory proof of the facts alleged in his declaration.

It is therefore impossible for us on mere presumptions to decree that the defendants

have been guilty of fraudulent violence which it was argued amounted to Larceny in law and which, in this suit, might carry with it caption of the body.

We cannot lose sight however of the fact that plaintiff might hereafter be able to complete his proof and we consider that justice will be done by non-suiting plaintiff with costs.

SUPREME COURT

SUIT IN FORMA PAUPERIS.—LEAVE OBTAINED.—ALIEN.—CASE RIPE FOR HEARING.—MOTION TOO LATE.—COURT CANNOT UNDO WHAT IT HAS DONE.—ADMISSION TO ROLL—INTIMATION TO OTHER SIDE.—OPINION OF THE JUDGES.

The plaintiff, an alien, was admitted, after the swearing of an affidavit and the taking of the opinion of a counsel, to enter his suit in formâ pauperis.

When the case was ripe for hearing, a motion was made by defendant to the effect that plaintiff should not be allowed to proceed further with his case without finding security judicatum solvi.

Held that the motion came too late and that if it were granted the Court who had authorised the plaintiff to sue in formâ pauperis, would be undoing with one hand what they had done with the other.

The Judges expressed an opinion that it would be better perhaps if the procedure of the Court did not allow admission to the roll without an intimation to the other side.

BÈGUE—Plaintiff

versus

HOUDLETTE & Co.—Defendants

Before

His Honor A. MURK—Puisne Judge

and

His Honor G. C. MAYER—Acting Puisne Judge

F. MATHEWS,—Counsel for plaintiff

V. MARJOLIN,—Attorney for the same

The Hon. L. ROUILLARD,—Counsel for defendants

P. E. DE CHAZAL,—Attorney for the same

Record No. 29280.

6th July 1886.

His Honor Mr. JUSTICE MURK:

This is an action asking for a reddition of accounts and for damages in which the pleadings have been completed and the case is ready for hearing. A motion was made by the plaintiff yesterday that a rogatory commission should issue in order that the evidence of parties whose testimony was stated to be necessary should be taken in Bourbon. That motion was met by a counter motion on the part of the defendant that this person was not entitled to proceed with his action unless he found security *judicatum solvi*, he being an alien and suing in this Court as an alien. Now the peculiarity of the matter is this; that the plaintiff was found entitled to the benefit of poverty and was admitted to plead in *forma pauperis* before he commenced his

proceedings, that is to say, the Judge in Chambers had a petition presented to him in which it was maintained that there was a good cause of action, that the party had not £ 5 in the world—an affidavit to that effect was made and a remit was made to a Counsel to consider whether he had a *probabilis causa* and that remit was answered satisfactorily before this procedure was allowed. Now the case has gone on until the time of hearing and then this motion is made. We have carefully considered the matter and looked into the English authorities upon the subject. There is an ordinance in this Colony No. 37 of 1881, which directs that the laws and practice followed by the High Court of Justice in England in regard to civil suits brought by or against paupers shall be followed by the Supreme Court of Mauritius.

That being so we have endeavoured to ascertain whether there was any authority on this question, but so far as our researches have gone we have not been able to find that the English Courts have ever had this point to determine. We are therefore left to the light of our own judgment in the matter. My learned brother and I have felt that if we were to grant the motion made to us at this time the Court would be undoing with one hand what it had done with the other. We have declared by our procedure that this party is entitled to litigate *in forma pauperis* and if we now order him to find security we should certainly undo that previous order, not directly but by a side wind. In our opinion the two positions clash and the present motion ought not to be assented to.

In addition to that it is right to state that there seems to us to be a defect in the procedure adopted by the form of the process in this Court and that a party should be admitted to the roll without notice to his opponent. It would I think be better if our form of pro-

cess permitted intimation to the other side so that admission to the roll would not be an *ex parte* proceeding. But still that fact comes to the knowledge of the other side at a very early date in the litigation and it seems to us that the proper procedure in a case of this kind where an alien is suing and where there is to be an objection to the procedure on the ground of alienage, would be that an application should be made to the Judge in Chambers to recall the order which he has previously pronounced, in order that the question whether *security judicatum solvi* should be found could be determined. In short it seems to us that in the procedure adopted here the motion comes a little too late, and under those circumstances we can only refuse the motion and direct that the case shall proceed.

SUPREME COURT

CLAIM FOR RENT — PART OF BUILDING IN BAD STATE OF REPAIR — PLEA THAT NO RENT IS DUE — EVIDENCE — OWNER SHOULD HAVE REPAIRED THE BUILDING — TENANT SHOULD HAVE APPLIED TO COURT — RIGHT OF TENANT TO MAKE REPAIRS AFTER AN ORDER BY A COMPETENT COURT AND NEGLECT OF PROPRIETOR TO COMPLY WITH THE ORDER — TENANT SUED NEED NOT ENTER PRINCIPAL ACTION IN DAMAGES — ENTITLED TO A PROPORTIONAL DEDUCTION FOR NON-USER OF PART OF THING LET — JUDGMENT FOR HALF THE RENT CLAIMED — NO COSTS.

The plaintiff, owner of a large building let to defendant to be used as a store, claimed from the latter Rs 1800 for nine months rent.

The defendant pleaded that owing to the want of proper repairs, after warning duly given to the plaintiff, he had not been able to use the building and consequently was not liable for rent.

After hearing the evidence on both sides, and after a personal inspection of the place, the Court ruled :

10. *That part of the building had stood in need of repair for several months, and that the plaintiff had been made aware of that fact.*
20. *That the defendant had been prevented during those months from using that part of the building.*
30. *That the tenant in this case should have summoned the proprietor to perform the necessary repairs and, if after an order obtained to that effect from the competent court, the proprietor had neglected to make the same, the tenant might have done so, deducting the amount thereof from the rent.*
40. *That it is not indispensable for a tenant who is sued for rent, when he has been deprived of the use of part of the thing let, to enter a principal action in damages, but that it is competent for him in his plea to the action for rent, to ask for a proportional deduction from the amount claimed.*
50. *That as the defendant here had retained the whole building in his possession, and part thereof was capable of being used by him, judgment should go for half the amount claimed, without costs.*

VUILLEMIN,—Plaintiff

versus

FRANKLIN. — Defendant

Before

His Honor A. MURE,—Puisne Judge

and

His Honor G. C. MAYER,—Acting Puisne Judge

H. GALÉA,—Counsel for plaintiff

A. BÉTUEL,—Attorney for the same

V. DELAFAYE,—Counsel for defendant

E. LEBLANC,—Attorney for the same

Record No. 23,330

13th July 1886.

His Honor Mr. Justice Mure :

This is a case in which a claim of rent for nine months at the rate of Rs 200 a month is made against the defendant. It appears that the plaintiff by a private deed of the 19th November 1883 leased to the defendant from the 1st of December 1883 up to the 1st of December 1884 a store in Passage Monneron. This deed contained a stipulation that at the option of the defendant the lease should be renewed for another year, from the 1st December 1884 up to the 1st December 1885 and by a minute upon one of the copies of the lease it was so renewed and thus the lease between these parties came finally to expire on the 1st December 1885. The defendant paid his rent regularly up to February 1885, he declined to pay rent thereafter and this action is brought for the various sums of rent unpaid amounting to Rs 1800.

The defendant remained in possession of the premises until the expiry of the lease of the 1st December 1885 and only then gave up the premises to the plaintiff. *Prima facie* such a person is undoubtedly bound to pay the rent of the premises which he occupies, but the defendant's plea to this action is that from February 1885 up to the end of the lease he was deprived of the use of the premises in consequence of the dilapidated and bad state in which they were,— he further says that the plaintiff was duly warned of that state of the buildings and was called on to repair the same

and that he did not do so. In replication the plaintiff admits that he received warning that the premises required repair, he alleges that he caused all the necessary repairs to be immediately made and the property was properly repaired and put in good state of repair.

In that state of the pleadings we had a long proof and my learned brother and I ourselves made an inspection of the building in the presence of the agents of the parties ; and in coming to a judgment upon this case we think it important, in the first place, to state the facts as they appear to us to have arisen ; for on both sides we find there has been a great diversity of statement as to what the real facts are, and as the result of this case depends much more upon the facts than upon the law we think it important in the first place that we should exactly fix the facts that have occurred and our opinion as to the present state of the building.

The building in question is a large store near the railway station, very strongly built, it has in it very large beams of wood and has been intended to be very solid. It consists of two stories and of four compartments. There is a very weighty roof upon the building, that roof is supported in the centre by pillars which run along the whole length of the building. These pillars extend from the floor of the building up to the roof, through the floor of the upper story and they were placed originally upon a beam or beams of wood which ran along the floor, and were partially, I suppose, sunk in the earth which forms the floor of the building. Now, in February 1885, it appears that this became affected with dry rot or some other malady, two at least of the pillars sank down, the effect of which was that the cross beams in the upper story which rested on the pillars and helped to support the roof and to strengthen it—were in more than two of their places driven out of their sockets—the iron

clamps, which are called in French : "équeres en fer" were also wrenched from their places and the force necessary to take the large screws with which they are fixed out of the wood must have been very considerable indeed. We are told that at the time this happened and there is no doubt that it is the fact, that this store was being loaded with rice and that the tenant immediately stopped the loading as water was coming through the roof in large quantities, that he had to send for a tin-smith, had the roof temporarily repaired and sent away the rice that was in the premises. Before proceeding further, I think I may say it is evident that the sinking of the pillars produced the effect that the floor of the upper story inclined towards the centre and the roof of necessity also sank down towards the centre to some extent. The effect of that must have been in the language of some of the witnesses that the roof was all distorted and therefore it is not surprizing that a great deal of water entered the store at that time—now what was done was this, the defendant, the tenant, informed in the first place Mr Constant Vankeirsbilck the plaintiff's collecting clerk and told him that the building threatened to fall, that it was seriously damaged and Mr Vankeirsbilck reported that to plaintiff. He directed Mr Vankeirsbilck to do certain repairs, to change the foundations of the sunken pillars. That was done, the foundations of the pillars are now stones which are fixed in the ground and the roof was at the same time repaired, according to the supposition of Mr Vankeirsbilck sufficiently so, and was repainted. Now as the upper floor had sunk down, great power was required to raise it again ; the plaintiff employed what are called screw crows, or in french "vérins" by the help of which the floor was put in its proper place, and the stones were introduced beneath the pillars in the building. But it is alleged that the building was not sufficiently repaired, that it still leaked and undoubted-

ly we think from our own inspection of the building and from the evidence that we heard, that the very fact of raising those pillars could not replace the roof and the cross beams and the iron clamps in their original position but that probably, nay almost certainly, it increased the dislocation of its various parts, and in that way it is impossible for us to hold that the building was completely and satisfactorily repaired. In August of that year the building was inspected by the first skilled witness examined, the Hon. Mr Connal, Surveyor General and the result of that gentleman's survey of the buildings,—and we must say that we place great reliance on his testimony as a man of great experience and very high position—the result of his survey after all the repairs which the plaintiff intended to give to it had been effected, was that the roof was still distorted, and as he says he could see the light through many places in the roof. Then again with regard to what has been a subject of great dispute and difficulty between the parties namely the cracks in the wall.

There is one crack especially which is described by the former owner of the property, Mr Hardwick Wilson, as having existed from an early date and that the crack was widened, that large stones were put in it and in that way the building was completely repaired. It seems to us to be clear that at the time of the sinking of the foundation of the pillars that crack to some extent reopened—we ourselves saw day light through it and it seems to us undoubtedly that from some cause or other there had been a slight movement of some kind in the wall of the building itself at that time. Now what was the position then of this building, is the next question for us to consider ?

It certainly was not a building that could perform all that the tenant intended it to

perform as a store. The dislocation of the roof was such that he did not consider it safe and we are of opinion that he properly did not consider it safe to store goods in it in the upper story. The plaintiff could not complain if we were to take the evidence of his own witness Mr Droz, who tells us that this building by the measurements he had made could contain 80,000 bags of grain or of sugar and that it would only be safe now to put 6000 bags in it. But from our own inspection we think that the lower part of the building remained perfectly capable of being used as a store, that machinery, guano and various kinds of grain might have been safely put into that part of it, and we have now to consider what in the circumstances was the relative duty of these two gentlemen, the one the lessor and the other the lessee of the building. The one had been told that his repairs were not sufficient or satisfactory, that the building was even threatening to fall and he had made certain slight repairs which he knew very well could not meet the wishes of his tenant. The other remained in possession of the subject without doing any thing more than expect that the landlord should repair it better than he had done, and he remained in possession and occupation of this subject until the end of the lease.

In the first place it is clear that under Article 1722 of the Civil Code which provides for the destruction in whole or part of the subject and which says that if the subject is wholly destroyed the lease may be cancelled as a matter of right, but if it is only partially destroyed according to the circumstances, the tenant may demand a diminution of the rent or a termination of his lease. We have not to deal with a case of that kind, but with a case in which under article 1720, it is said the lessor is bound to make on the subject leased during the continuance of the lease all the repairs that may become necessary.

Now in these circumstances what was the relative duties of the parties and the conduct that they should have pursued towards each other. On the one hand the landlord was bound to repair the subject completely and fully to make it such that it would completely protect the goods stored under it from becoming wet and to make it so strong that it would keep the proper quantity of goods in it. That was the duty of the landlord and we think that he failed to perform that duty.

On the other hand was it allowable for the tenant to remain in possession of the subject until the end of the lease, without using it in any way or making use of that part of it which was still capable of being used and only when the lease came to an end to hand over the keys to his landlord? We think that what Dalloz says in his article "louage" No. 172 may be quoted as apposite; he says: "Lorsque le bailleur assigné pour faire les réparations ne convient pas qu'il y en ait à faire, le juge ordonne une visite des lieux, puis il condamne le bailleur à faire les réparations dans tel délai, faute de quoi, le locataire est autorisé à les faire lui-même et à en retenir le montant sur les loyers par lui dûs ou s'il n'en doit pas il s'en fera rembourser par le bailleur". We consider that that is the position which a tenant ought to take up towards a landlord who will not duly perform his part of the contract.

But these parties did not do their duty, as I say, on either side and the question comes to be just this, what is law and equity as between them. On the one hand it is contended that the plaintiff is entitled to a decree for Rs 1,800 of rent as claimed and on the other hand it is contended that the declaration should be dismissed with costs.

Now, undoubtedly, we do not think we are bound in law to give the landlord a decree for the whole rent. I may mention that

it has been laid down in certain systems of jurisprudence in similar cases that the tenant is left to an action in damages to indemnify him for the loss which he has suffered, but find that there is authority under the system of law which we are administering which says, as Dalloz does, in number 304 of his article on "louage" :

" Lorsque sur l'action en payment du prix du bail le fermier defendeur se plaint de n'avoir pas joui, par la faute du bailleur d'une partie du bien loué par lui et pose des faits pour justifier cette allégation, le juge ne peut, avant de l'admettre à la preuve, le condamner au payment du fermage demandé ",

The case upon which the doctrine is founded is reported—and we have no other report of it here—at No. 743 of the article on "louage" where I find that the Court says this : " Attendu que l'appellant ayant posé divers points propres à justifier que les acquéreurs avaient laissé séjourner sur quelques parties des terres données en bail des arbres déjà abattus et n'avaient pas enlevé les pieds de plusieurs autres, ce qui l'avait mis dans l'impossibilité de cultiver les dites parties et lui avait occasionné d'autres dommages, il y avait lieu de la part du premier juge, de l'admettre à la preuve de ces faits avant de le condamner au payment d'aucun fermage, puisque de ces faits devait résulter que l'appellant avait été privé de la jouissance d'une partie de la chose louée pendant tout le temps de son occupation. "

Now coming to the conclusion of this matter, we think that an equitable decision between the parties is this, that as the lower part of the premises in question was capable of being used by the defendant and as he retained the whole of the subject in his possession, we shall act fairly and equitably towards them by allowing the plaintiff to

obtain half of the rent which he claims. We shall therefore give a decree for Rs 900 of rent, but without Costs.

SUPREME COURT

PARTIES TO BE MADE CO-DEFENDANTS TO A PENDING ACTION.—SUGGESTION AT CHAMBERS.—CASE REFERRED TO COURT.—JUDGMENT.—THE PROPER PROCEDURE IS A NOTICE WITH SUMMONS NOT A SUGGESTION AT CHAMBERS.—NO DISTINCTION BETWEEN COMPULSORY AND VOLUNTARY INTERVENTION.—NO PREJUDICE TO FUTURE CO-DEFENDANTS.—POINT ARGUED FOR THE FIRST TIME.—APPLICATION ALLOWED WITHOUT COSTS.

An application was made by a plaintiff to a Judge at Chambers calling upon certain parties to shew cause why a suggestion should not be entered of record to the effect that they should be made co-defendants in an action which was then pending.

The matter was referred to Court, when, after argument, it was held :

10. *That the proper procedure in such cases is a notice with summons under Art. 79 of the Rules of Court and not a simple suggestion at Chambers made under Art. 80 of the same Rules.*

20. *That there is no reason why a distinction should be made between cases of compulsory and cases of voluntary intervention.*

But as no prejudice had been suffered here by the party sought to be made co-defendant and as it was the first time apparently that this point of procedure had been seriously raised and argued, the Court did not set aside the irregular proceedings and

allowed the application to be made, but without costs.

—
DICK,—Plaintiff

versus

THE CENTRAL SUGAR ESTATES
COMPANY.

—
Before

His Honor E. J. LECLEZIO,—Chief Judge.

and

His Honor E. DIDIER ST AMAND,—Acting
Puisne Judge.

—
H. GALFA,—Counsel for plaintiff

V. G. DUCRAY,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for defendant

E. DUVIVIER,—Attorney for the same.

—
Record No. 22,932.

21st July 1886.

His Honor the Chief Judge :

We had taken time to consider on a motion which was made in this case in order to obtain a judgment of the Court to the effect that the Oriental Bank should be made co-defendants in this case at the request of the plaintiff.

The case came by way of an application in Chambers calling upon the liquidators of the Oriental Bank Corporation to shew cause why a suggestion should not be entered of record to the effect that the said Oriental Bank Corporation in liquidation are now the owners of the Sugar Estate "St. Julien" on account of the purchase made by the Liquidators on the 30th of July last at the Bar of the Master of the Supreme Court upon the sale by levy

thereof and secondly why the said liquidators should not be made parties as defendants in the above matter in as much as the said Oriental Bank Corporation are now the proprietors of the Sugar Estate "St. Julien". Before the Judge in Chambers the Oriental Bank prayed that the matter be referred to Court and the attorney for the plaintiff having no objection the matter was referred to be heard at the same time on the main action. In Court the point taken was that the procedure which ought to have been followed was either by way of principal action or by way of notice with summons, in virtue of Art. 79 of the rules of Court. On the other side it was contended that the application had been duly made in virtue of Art. 80 of the rules.

There is no doubt that in this case the object of the plaintiff is that the Oriental Bank should be partially substituted for the Central Sugar Estates with regard to one of the issues that is to say, the restitution of the water of the Canal which is made use of by the "St. Julien" Estate. With regard to the other issue, that respecting the damages, nothing is said by the plaintiff concerning the Oriental Bank. It is clear however that the judgment with regard to the ownership of the Canal must be common to both the parties, because in order to award the damages against the Central Sugar Estates Company, as well as in order to grant the restitution of the water the Court must first decide the question of ownership of the water.

According to the authorities quoted upon the French Code of Civil Procedure, when parties are called before the Court in order that the Judgment be common to all the defendants both those against whom the action was entered at first, and those who are called after the action is entered, it is to be done by way of a principal action. However the Oriental Bank in this case through its Counsel did not insist upon that jurisprudence of

the French Courts in regard to forced intervention and it was suggested that the procedure to be followed was to be by way of notice with summons and it was said that as in voluntary interventions the procedure followed and admittedly according to the practice is notice with summons, in the same way when there is to be a forced intervention the same procedure should be followed. We are of opinion that for ordinary forced interventions the same procedure should be followed. We do not see any difference between the case of a *garant* called into a case and that of a person who is a complete stranger to the defendant already in the action and whom the plaintiff wants to call as a co-defendant in the case — we do not see why the new defendant should not be called by means of the same procedure which has been adopted for cases of voluntary intervention. At the same time we find that in this case there was an event which occurred after the action had been entered which rendered necessary the calling into the case of the new owners of the estate upon which the Canal which is the principal subject matter of the suit is running. Now rule of Court 79 does not in so many words speak or allude either to voluntary interventions or to forced interventions before the Court, and Rule 80 speaks of events taking place after a suit has been begun, such as the death of a party, it was admitted that under the Common Law Procedure Act that article was not limitative but that it could be extended to cases of marriage or of bankruptcy, we therefore can understand that the attorney who was in charge of the proceedings here was in a rather difficult position with regard to the procedure to be followed and that in presence of those two articles both of which to a certain degree applied to the circumstances of the case which was in his hands, he had some hesitation with regard to the choice to be made. However we were told that the Court had decided in a

case of a similar nature that the procedure to be followed was by notice with summons and not by the way of suggestion. We have looked at that case which was quoted to us (Duprat & Laroque vs. Delastelle) but unfortunately the proceedings in the record are so vague that it is quite impossible to say what was the point argued before the Court. In the minutes of the proceedings it is simply said that the matter was referred to Court, that the parties were heard and that as there was a double application made before the judge in Chambers the first part of the application was granted, and the second part was refused, but on what grounds the first part was granted and on what ground the second part was refused is not to be found in the record ; and even in the minute book of the registrar nothing is stated as to the nature of the argument. Therefore it cannot be said that there was a jurisprudence established which was to serve as a guide to the profession in such cases. Under these circumstances although we are of opinion that in cases similar to the one which is now before the Court the best course to be followed under our rules of Court is the procedure by notice with summons, instead of by means of a simple suggestion made in Chambers, We think that as no prejudice was argued here as having been caused to the Oriental Bank and that as this is the first time to all appearances that the first point has been really raised and argued before the Court we are not disposed to set aside the proceedings which have been adopted in this case.

We will, therefore, allow the application that has been made, but without Costs — and we will allow a delay of eight days to the Oriental Bank, if need be, to file a plea in this case — But we wish it to be distinctly understood that in cases of a similar nature the Court is clearly of opinion that the procedure to be followed in conformity with the spirit of our rules and regulations is by way of notice with

summons under Art. 79 and not by way of a simple suggestion under Art. 80 and if we do not set aside the proceedings in this case, it is merely because it appears to us that it is the first time that the point is seriously taken before the Court and that this is the first judgment that is given on the matter.

The Oriental Bank Corporation is allowed a delay of eight days to file a plea if need be, after the question of the amendment of the declaration shall have been decided.

SUPREME COURT

ATTACHMENT IN THE HANDS OF GARNISHER

— DECLARATION AFFIRMATIVE MADE BY THE LATTER—ACTION AGAINST GARNISHER

—DECLARATION FALSE AND FRAUDULENT—

GARNISHER ASKED TO BE MADE DEBTOR PURELY & SIMPLY—DEMURRER—ART. 577

OF THE FRENCH CODE OF PROCEDURE CIVILE

—DIFFERENCE BETWEEN AN AFFIRMATIVE DECLARATION WHICH IS IRREGULAR AND INSUFFICIENT AND A FALSE AND FRAUDULENT ONE—

CONCLUSIONS OF PLAINTIFF'S DEMAND NOT APTLY DRAWN UP—THESE

CONCLUSIONS TO BE AMENDED—DEMURRER NOT ALTOGETHER ADMITTED—COSTS OF

THE INCIDENT RESERVED.

The plaintiff lodged an attachment in the hands of the defendant, it was validated and the defendant afterwards made an affirmative declaration that he owed plaintiff's debtor a sum of Rs 500 only.

Thereupon plaintiff entered the present action in which he alleges that the declaration was false and fraudulent and asks that the defendant should be held debtor purely and simply in the amount of the principal sum mentioned in the attachment, with interest thereon and Rs 500 for costs.

Defendant pleaded on the merits, and further demurred to the conclusions of the plaintiff's declaration.

Held by the Court:

10. *That the conclusions of plaintiff's declaration seem to have been framed under art. 577 of the French Code de Procédure Civile.*

20. *That, according to the French jurisprudence, the above art. 577 can be founded upon only when the "tiers saisi" makes an irregular or insufficient affirmative declaration and not when the declaration is false and fraudulent.*

30. *That in the last hypothesis, the tiers saisi is liable towards the seising creditor up to the amount which he owed to the seized debtor and besides to damages equivalent to the loss caused by the fraudulent statements which he has made.*

40. *That in the present case, although the conclusions of the declaration had not been aptly drawn up, as its averments, however, if proved, would justify a decision in favour of the plaintiff, the demurrer could not be sustained.*

The plaintiff was ordered to amend the conclusions of his declaration, and the costs of the incident were reserved for determination at the end of the case.

SAUZIER,—Plaintiff

versus

RAFFAUT,—Defendant

Before

His Honor A. MURE,—Puisne Judge

and

His Honor G. C. MAYER,—Acting puisne

Judge

E. GALLÉT,—Counsel for plaintiff

G. KÖNIG,—Attorney for the same

V. KIVERN,—Counsel for defendant

L. WOERNITZ,—Attorney for the same

Record No. 22699.

23rd July 1886.

In this case a *démurrer* has been pleaded by the defendant and in disposing of it the Court has to consider whether the plaintiff has set forth a sufficient case to warrant a judgment being given in virtue of the allegations and conclusions contained in the declaration. From it, it appears that Sauzier the plaintiff, who was a creditor of Allas in rupees 2354.99 under a judgment of the Supreme Court lodged an attachment in the defendant Raffaut's hands on 13th December 1883, which was validated on 2nd August 1884. This was followed by an affirmative declaration made by Raffaut on the 26th August 1884 in which he alleged he was indebted to Allas only in rupees 500, the balance of rupees 600 for which on 9th December 1883 Allas sold to him his share of the teak timber of the wrecked ship "Stenhope". He at the same time filed in proof of this allegation a "*sousseign privé*" dated 9th December 1883 and registered on 5th January 1884. It is alleged that this affirmative declaration is false and fraudulent, that the alleged sale never took place and no part of the alleged price was ever paid, that further, Allas' share of profit in the sale of the Stenhope timber is of large amount and that the defendant has failed to declare the exact amount of Allas' share and his interest in the profits of the sale. The declaration concludes that the Court should hold that the defendant Raffaut is debtor purely and simply in the above principal sum, interest thereon and rupees 500 for costs.

To this declaration the defendant Raffaut, besides denying all the allegations made in the plaintiff's declaration and pleading on the merits, has *demurred to the conclusions of the plaintiff's declaration*, because admitting all the averments in it to be true and correct the plaintiff is not entitled in law to ask judgment in terms of the declaration.

It is true that the conclusions of the declaration seem to have been framed under article 577 of the Code of Civil Procedure and, although that article is not expressly founded upon by the plaintiff, it is clear from the conclusions of the summons that he had in his eyes a liability against the defendant in virtue of the enactments in it.

The Courts in France in interpreting the article in question have held that when the "*tiers saisi*" made an irregular or insufficient declaration yet he came within the provisions of the article; but that if his declaration was false and fraudulent he was not liable under article 577, but was yet liable in an action for payment to the seizing creditor of the amount which he owed to the seized debtor and besides to damages equivalent to the loss caused by the fraudulent statements which he had made. This was the judgment of the Court of Cassation in the case of *Morin versus Bernard*, Sirey 1848. 1. 219. That was followed by the case of *Fondadouze versus Fauveau* decided in the Court of Bordeaux S. V. 1855 2.761 in which the following judgment was pronounced, "*attendu que Fondadouze n'est donc pas fondé à demander que les frères Fauveau soient déclarés débiteurs purs et simples des causes de la saisie, que seulement ils doivent être condamnés à représenter les vins dont il s'agit &c.—Par ces motifs faisant droit de l'appel interjeté, met le jugement à néant et faisant ce que les premiers juges auraient dû faire, valide la saisie arrêt... dit que les dits Fauveau*

" étaient détenteurs au moment de la saisie
 " arrêt de la quantité de 1368 litres de vin
 " appartenant à Flouret, que leur déclaration
 " est fausse et frauduleuse en conséquence
 " les condamne à représenter la dite quantité
 " de vin &c."

Without entering on the fine distinctions which were drawn by the plaintiff's Counsel we think the above decisions are sufficient to warrant us in holding that the conclusions of the declaration have not been aptly drawn out and that judgment could not be delivered in their exact terms, nevertheless, as the averments contained in the declaration would, if proved, justify a judgment in favor of the plaintiff, we cannot sustain this demurrer, we therefore order the declaration to be amended so as to leave out those parts of it which call upon us to apply art. 577 of the Code of Civil Procedure and to conclude by asking that judgment be given for the plaintiff in the amount which was due by defendant Raffaut to defendant Allas on the 13th December 1883 at the moment the attachment was lodged in the hands of the said Raffaut. We allow the plaintiff eight days to file the amendment and we also allow the defendant eight further days after that has been done, to amend his plea if he thinks it necessary to do so.

Costs of this incident reserved for determination at the end of the case.

SUPREME COURT

TRANSFER OF CLAIM.—NON EXISTENCE OF THE SAME.—PROCEEDINGS AGAINST DEBT-OR DENOUNCED TO TRANSFERRER—GARANT—PRINCIPAL SUM TRANSFERRED CLAIMED.—PROCEDURE SOUND—TRANSFERRER CONDEMNED AS GARANT TO PAY THE WHOLE AMOUNT CLAIMED.

A party having transferred to plaintiff a debt alleged to be due by a third party, it was subsequently discovered that the debt had no existence.

Thereupon the plaintiff's agent intimated the whole proceedings to the transferrer and called upon him as a garant to pay the principal sum transferred.

The Court, on the authority of Chauveau, Carré and Rodier, held that the procedure adopted was sound and gave judgment against the transferrer for the whole amount claimed.

FANUCCI,—Plaintiff

versus

L. VÉRONGE & Co.

Before

His Honor A. MURE,—Puisne Judge

and

His Honor E. DIDIER ST. AMAND,— Acting
 Puisne Judge.

Y. JOLLIVET,—Counsel for Plaintiff

J. MALLET,—Attorney for the same

G. GUIBERT,—Counsel for defendant

C. ROUSSET,—Attorney for the same.

Record No. 23,333.

23rd July 1886.

His Honor Mr. Justice Mure :

In this action a party had transferred an alleged claim to Fanucci by a *sous-seing privé* and upon the assignee proceeding to make

good his claim against the alleged debtor Véronge & Co., it was found that Veronge & Co. did not exist in the first place, and that, in the second place, Veronge was not the debtor of Langlois the wife. The agent then intimated the whole proceedings to Langlois the wife and her husband for authorisation and the question before us is whether he is entitled to the principal sum for which he sought to obtain decree against L. Véronge & Co. This application is made to us not exactly in the ordinary circumstances in which a plaintiff usually seeks a judgment against a third party who has been called upon to intervene; and for that reason we have thought it well to read the papers and look into the circumstances of the case. Having considered the matter we are quite convinced that the plaintiff is entitled to the remedy which he asks. I may refer to Chauveau & Carré under the title "actions en garantie" Volume 1 page 298 "and question 265" "n'appartient-il qu'au défendeur originaire de profiter du bénéfice accordé par la huitième disposition de l'art. 59? Puisque la loi ne fait aucune distinction entre le demandeur et le défendeur il paraît certain que la faculté accordée par cette disposition appartient à l'un et à l'autre. C'est encore ce que disait Rodier *Quest. 1er sur l'art. 1er du tit. 8 de l'Ordonnance*, en citant pour exemple du cas où le demandeur peut appeler garant, celui d'un Cessionnaire qui agit contre le débiteur délégué."

That is exactly the case we have here, and we have therefore the high authority of Chauveau and Carré that this procedure is justified.

Therefore we give decree against Langlois the wife and her husband in the terms in which the intimation was made by the plaintiff to the defendant with costs.

SUPREME COURT

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE.—AMENDMENT OF INFORMATION GRANTED. — CONVICTION INCOMPLETE. — RECORD SENT BACK FOR EXPLANATIONS. — JUDGMENT ON THE MERITS DELAYED.

An amendment of a criminal information had been allowed by the District Court, and no mention of the fact appeared in the formal conviction drawn up after the judgment had been appealed against.

The Court considered that the conviction should contain a narrative of all that had taken place in the case. The record was sent back to the Magistrate for explanations with regard to the omission, and judgment on the merits was delayed in the meantime.

BOLAS,—Appellant

versus

QUEEN,—Defendant

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor GEO. C. MAYER,—Acting
Puisne Judge

D. JENKINS,—Counsel for Appellant,
V. DUCASSE,—Attorney for the same.

THE SUBSTITUTE PROC. GENERAL,—Counsel
for Respondent,
J. GUIBERT,—Attorney for the same.

Record No. 531.

3rd August 1886.

In the course of the argument in this case, which is an appeal from a conviction of the Junior District Magistrate of Port Louis, our attention was called to this fact that although an amendment had been allowed by the Magistrate to the information, no mention of such amendment was made in the formal conviction drawn up after sentence had been passed. There is no doubt that a formal conviction should contain a narrative of all the proceedings that have taken place in the case and that if an amendment to the information is allowed it should be mentioned in the formal conviction.

We see that in the case of *Gungee and others vs. Queen* S. C. Reports 1861 p. 77 where in the formal conviction there was an omission, among other things, of the law on which the prisoners were convicted, the Court delayed judgment till the papers should be transmitted to the Magistrate for any explanations that might be offered.

We will follow the same course here and send back this record to the Magistrate for explanations with regard to the omission complained of, and delay our Judgment on the merits in the meantime.

SUPREME COURT

SEIZURE BY A CREDITOR OF HIS DEBTOR'S SHARE IN AN ALLEGED CIVIL PARTNERSHIP.—SHARE SET UP FOR SALE BEFORE THE MASTER.—ACTION IN NULLIFICATION OF THE SEIZURE.—SHARE IN INDUSTRIAL COMPANIES A MOVEABLE.—ART. 529 CODE CIVIL.—CERTAIN SHARES ARE MOVEABLES

AND CAN BE SEIZED AND SOLD.—A FAMILY COMPACT EXISTS IN THIS PRESENT INSTANCE.—HEIRS HAVE BOUND THEMSELVES TO REMAIN IN INDIVISION FOR A CERTAIN TIME AND TO WORK SUGAR ESTATES FOUND IN A SUCCESSION.—OWNERSHIP OF THE ESTATES NOT TRANSFERRED TO THE PARTNERSHIP.—“JOUISSANCE” ONLY HAS BEEN TRANSFERRED.—PARTNERSHIP ONLY A SECONDARY OBJECT HERE.—CREDITOR HAS NO MORE RIGHTS THAN HIS DEBTOR.—DEBTOR HERE CANNOT SELL HIS SHARE.—ARTS. 2205, 2092, 2093 OF THE CODE CIVIL.—SEIZURE NULL.—SEIZURE AND SUBSEQUENT PROCEEDINGS SET ASIDE WITH COSTS.

A seizure was made by a creditor of the share of his debtor in an alleged civil partnership entered into by several heirs and that share was put up for sale before the Master of the Supreme Court.

The present action was then entered for the removal of such seizure as illegal.

It was contented by the defendant (the seizing creditor) under Art. 529 of the Code Civil, that the intérêts or shares in industrial companies are moveables quoad the partners, though the assets be composed of immoveables which belong to the partnership.

The Court admitted that certain shares, such for instance as the shares of our Sugar Estate Companies in Mauritius, may be seized and sold at the request of a creditor of the shareholder, but the Court considered that in the present instance, a family compact had been entered into by the heirs chiefly for the keeping in indivision during several years and for the working of several Sugar Estates; that the intention of the parties was to retain the ownership of the immovable properties mentioned and to transmit only their “jouissance” or usufruct for a

certain time to the partnership formed with the object of working them, the partnership here being a mere accessory, secondary to the principal convention in the family compact.

As a creditor has no more rights than the partner who is his debtor, and by the above compact the partner-debtor could not sell his share or interest in the partnership, the Court applying Art. 2205, 2092 and 2093 of the Code Civil held that the seizure was null.

The proceedings which followed the seizure and the seizure itself were set aside with costs.

E. POUCKET and wife,—Plaintiff

versus

GOOLAB and ors,—Defendants

HEIRS PIERROT,—Intervening parties.

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor E. DIBIER ST AMAND,—Acting
Puisne Judge

Between

E. GALLET,—Counsel for plaintiffs
E. LAURENT,—Attorney for the same

H. GALÉA,—Counsel for defendants
W. EDWARDS,—Attorney for the same

W. NEWTON and H. HEWETSON,—Counsel for
Heirs Pierrot intervening parties.

W. HEWETSON,—Attorney for the same

Record No. 23301

4th August 1886.

This is an application referred from Chambers, by which the plaintiffs asked that an alleged seizure made by an usher at the request of the defendants of the share of Mrs. Pougnet in the civil partnership known under the name of "Héritiers Adelson Pierrot" for the working of the Estates "Savinia" and "Eau Bleue," should be removed as illegal.

After the death of Mr. Adelson Pierrot his heirs, in conformity with the views expressed by their father in his last will, entered into a family compact by a deed of Notary Raoul, dated the 22nd June 1881, they agreed to remain in a state of indivision for five years and formed a civil partnership for the same period for the working in common of the Estates *Savinia* and *Eau Bleue*, and of the manure establishment at Mahebourg. They made certain stipulations with regard to the management of the Estates, giving to each manager the necessary powers "de faire tous les actes qui ne sortiront pas du cadre de l'administration," adding that none of the partners "n'aura le droit de vendre ou d'hypothéquer sa part des immeubles sociaux pendant le cours de la société."

By a deed under private signatures dated 31st December 1885 the heirs Pierrot agreed to remain in a state of indivision for a new period of three years and to continue the civil partnership already existing between them for the same period.

The defendants Goolab and others, as creditors of one of the heirs Pierrot, Mrs. Pougnet, have seized her share and portion in the civil partnership "héritiers Adelson Pierrot" and want to sell it before the Master of the Court together with all the rights, actions and privileges attached to such share and portion and the interest and accessories thereof generally whatsoever.

In the memorandum of charges filed in the Master's Office it is stated that "the capital of the said partnership is composed of the net assets of the estate and succession of the late Adelson Pierrot valued at the date of the forming up of the aforesaid partnership at the principal sum of Rs. 733,310.51.

It may be remarked here that the partnership is not composed of the net assets of the whole of the succession of Adelson Pierrot as described in the *Cahier des Charges*, the partnership having been formed as stated above, only for the working of the Sugar Estates and of the manure establishment. For the defendants it was argued that they had the right to seize the share of their debtor in the partnership because under Art. 529 of the Code Civil, "*sont meubles les actions ou intérêts dans les compagnies de finance, de commerce ou d'industrie, encore que des immeubles dépendans de ces entreprises appartiennent aux compagnies. Ces actions ou intérêts sont réputés meubles à l'égard de chaque associé seulement, tant que dure la société*;" and it was added that it resulted from the deed of partnership that the heirs Pierrot had conveyed not only the "*jouissance*" but also the ownership of the immoveable properties to the partnership "*héritiers Adelson Pierrot*" so that the share of each of the partners in the partnership had become moveable and could be seized and sold by a person creditor of one of the parties. Laurent, Vol. 26, No. 354 was quoted in support of this theory, but this passage must be read with No. 356 and also with his commentary of Art. 529 in Vol. 5, No. 505.

It is not to be doubted that shares even in certain partnerships formed for the acquisition and working of landed properties, such for instance as our sugar Estates Companies, may be seized and sold at the request of the personal creditors of the shareholders,

but the question becomes more delicate when we have to deal with partnerships such as the present one entered into by co-owners or by heirs in order to work one or several commog estates for a certain time. We do not well understand what would be the real advantage of a seizure like the present one which could only give rights of a dormant and uncertain nature to a purchaser, in which case a speculator is not disposed to give a very high price for what he purchases and the consequences may be disastrous for all parties. But apart from the practical point of view under which the matter may be considered, is the seizure legal? Laurent himself says that a creditor has no more rights than the partner who is his debtor, and if we came to the conclusion that the partner debtor could not sell his share or interest in the partnership, can his creditor seize that share and offer it for sale?

We cannot agree with the interpretation which has been given to the deed of partnership in evidence, we think on the contrary that the intention of the heirs Pierrot was to keep the ownership of the immoveable properties mentioned and to transmit only their "*jouissance*" or usufruct for a certain time, to the partnership formed with the object of working them. If they had intended to divest themselves of the ownership in favour of the partnership it would have been unnecessary to stipulate that none of them would have the right, pending the partnership, to sell or mortgage their share in those estates.

The case of *Brodie v. Bestel and others* S. C. Rep. 1866 p. 120 was quoted to us as a precedent showing that in civil partnerships for the working of sugar estates the ownership passes to the partnership. We have not before us the deed of partnership put in evidence in that case, but the Judges themselves admit in that judgment that there may exist copartneries for the bare

working of an Estate, they say "the estate "Ravensworth was worked by the partners, "because they were partners, there is no "thing to lead us to conceive a different "intent; *it was not an estate originally held "by two individuals or partners and who "subsequently became partners."*

Here, on the contrary, we have much to lead us to conceive that the intent of the heirs Pierrot was to form a co-partnery for the bare working of estates which their father in his last will and testament desired them to keep in indivision and to work in common for several years before making a partition; and the stipulation of the deed, as already stated, shows that they did not intend to convey all their rights of ownership to the partnership but only the usufruct of the estates; the main agreement was the remaining in indivision for a certain number of years, the partnership is a mere accessory, secondary to the principal convention in the family compact.

Such being the facts the case falls in our opinion under the application of art. 2205 which qualifies and restricts the rights of personal creditors such as they exist under art. 2092 and 2093, and the seizure is null.

The right of the personal creditor in such cases as the present one, must be limited to certain proceedings, such as the attachment of the share of his debtor in the profits of the copartnery,—this appears to have been done already but without any satisfactory result,—the creditor may also lodge an opposition to the extension of the partnership when it comes to an end, and to the partition of the property taking place out of his presence, and he may provoke the licitation of the estates, as indicated by Art. 2205, when the partnership is over, but the remedy which has been chosen in this case appears to us to be contrary to the law which governs the agreement entered into by the heirs Pierrot.

We must therefore annul the seizure which was made of the share of Mrs. Pougnet at the request of Goolab and others in the partnership "Héritiers Adelson Pierrot," and set aside all the proceedings which followed that seizure, with costs against the seizing creditors.

SUPREME COURT

CLAIM OF SHARE OF WATER.—AMENDMENT OF DECLARATION AT CHAMBERS BY CONSENT. PLAINTIFF HAS SOLD BEFORE ACTION THE SHARE OF WATER HE CLAIMS.—SUMMONS TO PRODUCE DEED OF SALE.—A SECOND AMENDMENT PRAYED FOR.—THE NEW AMENDMENT MODIFIES ALTOGETHER THE DECLARATION.—REAL POINT OF CONTROVERSY ALREADY DETERMINED.—AMENDMENT REFUSED.—PLAINTIFF NON SUITED WITH COSTS.—INTERVENING PARTY CONDEMNED TO PAY THE COSTS OF HIS INTERVENTION.

The plaintiff in this suit moved the Judge at Chambers for an amendment of his declaration which amendment took place by consent.

The defendants having subsequently discovered that plaintiff before entering his present action, had sold the very share of water which he claimed, summoned him to produce the deed of sale. Plaintiff then moved for a second amendment.

The Court ruled :

10. *That by the first amendment the real question in controversy had been clearly determined.*

20. *That the result of the amendment now prayed for would be to convert the present case*

into something quite different from the case submitted by the declaration.

The second amendment was there refused and the plaintiff non-suited with costs.

The intervening party who knew throughout the real state of matters was ordered to pay the costs of his intervention.

DICK,—Plaintiff.

versus

THE CENTRAL SUGAR ESTATES
COMPANY,—Defendant.

G. G. REID,—Intervening party.

Before

His Honor E. J. LECLEZIO,—Chief Judge

and

His Honor E. DIDIER ST AMAND,— Acting
Puisne Judge.

O. LAURENT,—Counsel for Plaintiff,
W. EDWARDS,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for Defendant,
E. DUVIVIER,—Attorney for the same.
H. GALÉA,—Counsel for REID.
Attorney for the same.

Record Nos. 22,932 and 23,218.

4th August 1886.

On the 7th of October, Louis Célestin Alexander Dick, as owner of a portion of land situate in the District of Flacq, entered an

action against the Central Sugar Estates Company claiming of the Defendants,

10. To restore forthwith to his said property the half of the water due in virtue of certain acts mentioned in the declaration.

20. To refit the Canal on their said property with sluices as they were bound to do.

30. To pay to Plaintiff the sum of ten thousand rupees, damages for the loss and prejudice suffered by him and also the costs of suit.

On the sixteenth of October the defendants served their plea, and in consequence of the statements therein contained, plaintiff obtained on the fifteenth of January eighteen hundred and eighty five, a summons calling upon defendants to appear in Chambers and show cause why the declaration should not be amended. By consent of parties, the Judge granted the amendment prayed for. The defendants traversed all the facts alleged and plaintiff having filed his replication, the case seemed ripe for hearing. On the seventh of June eighteen hundred and eighty six, defendants were again called upon to show cause why the declaration should not be further amended. They resisted the application and the Judge in Chambers referred the matter to the Court to be taken at the same time with the main action. This question of amendment has been fully argued before us and we have now to give judgment. Section 73 of the Rules of Court of 2nd of February 1852 gives the Court power to make 'all such amendments as may be necessary for the purpose of determining in "the existing suit, the real question in controversy".'

With the amendment made by consent on the fifteenth of July 1885 the real question in controversy seemed clearly determined.

Dick, it is to be supposed, knew what he wanted and prayed judgment accordingly. The

Defendants however, having become aware that Plaintiff, before this action was entered had sold in June 1882 by an act under private signatures which was then not registered, the very share of water, which he claimed as owner, and further that Dick, after parting with the bare ownership of seven acres of the said land, had sold to Tostée, the rest of his 78 acres and 56 perches, served in May 1886 upon Plaintiff a notice calling upon him to produce at the hearing of this cause, the three documents or copies thereof which established these facts.

The immediate result of this notice was an application from Plaintiff for what is described as an amendment.

We have to consider whether we can allow the Plaintiff to alter his declaration in its statement of facts and conclusions so as to fit a state of things which, if new in the knowledge of the Defendants was well known to the plaintiff at the time he began this suit. Mr. Reid and Mr. Dick attended at the office of Mr. Ducray, the attorney, at the same time, and it is difficult to understand why instructions were not given that the case should be stated as it did really exist. The amendment proposed, which is nearly as lengthy as the original declaration, constitutes a case very different from the one which the declaration first submitted to the decision of the Court. It is a new case grounded upon all facts well known to plaintiff before he entered his action and which the defendant's notices have compelled plaintiff to place before the Court and not a mere amendment to explain more clearly the respective pretensions of parties.

It is a new action forced upon plaintiff by the discovery of the documents mentioned in the notice of May 1886; and it is assuredly the plaintiff's own fault if he is now obliged to allege facts which were at first concealed

from the defendants and which must necessarily change the issues of the suit.

We therefore consider that this amendment cannot be granted and we nonsuit plaintiff with costs.

With regard to the costs of the intervention of Mr. Reid which we had reserved, we are of opinion that the statement of Mr. Reid fully establishes that he knew the real state of matters, when the action was originally entered and we consider that, in these circumstances, he must be made to pay the costs of his intervention.

SUPREME COURT.

Magistrate SOLESSS
APPEAL
PORT-LOUIS

APPEAL FROM A DECISION OF THE MASTER.

GUARDIAN APPOINTED TO CHILDREN, EX PARTE, UNDER ORD. 4 OF 1871.—PETITION FOR RECALLING THAT APPOINTMENT, — MASTER REFUSES TO ENTERTAIN THE SAME ON ACCOUNT OF QUESTION OF FILIATION AND CIVIL STATUS—APPEAL.—JUDICIAL FUNCTIONARY MAY CANCEL AN EX PARTE ORDER IN CERTAIN CIRCUMSTANCES.—SECOND ORDER OF THE MASTER BAD, IF FIRST WERE SOUND.—COMPETENCY OF APPELLANT'S PETITION SUSTAINED.—MATTER REPLACED IN STATU QUO ANTE—QUESTIONS OF FILIATION AND CIVIL STATUS TO BE RAISED IN A COMPETENT ACTION.

The Master of the Supreme Court upon an ex parte application appointed a guardian to three children born apparently after the departure from the colony of their mother's lawful husband. He proceeded upon the footing that the children were illegitimate; and under the provision of Ord. 4 of 1871 a petition was presented to the Master on the following day, praying for the cancellation of

the said appointment, and the Master refused to entertain it because the issue raised was the filiation and Civil Status of the children.

An appeal was made from that decision.

Upon the question raised in appeal that it would not have been competent for the Master to recall the Order previously made by him, the Judges held that every functionary who has judicial duties to perform is entitled if he has pronounced an Order in the absence of parties interested, to recall that Order de recenti and while matters are still entire, and decide the matter in foro contensioso.

The Court held also, that if the second order given by the Master was sound in law it was clear that the first order was bad in law.

The competency of the appellant's petition was sustained; the order appointing the guardian recalled and the grave questions raised by the facts of the case left to be determined in an action to be entered before the proper Court.

—
DAWOOD and wife—Appellants

versus

MAHADOO—Respondent

—
Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor ANDREW MURE—Puisne Judge

—
W. NEWTON,—Counsel for Appellants

H. BERTIN,—Attorney for the same.

A. HUGUES,—Counsel for Respondent

E. HUTEAU,—Attorney for the same.

Record No. 23,533.

9th August 1886.

In this matter which is an appeal from a judgment of the Master of the Court who refused to recall an order appointing the Respondent Guardian of three female children, it appears that a woman called Beegun Kugrattee, the daughter of the female appellant was on the 23rd May 1874, married to a man called Babadee Sab. It is alleged that the latter left Mauritius and went to India shortly after his marriage and there is an affidavit in process sworn recently that Babadee Sab was seen and conserved with in Calcutta by the deponent about two years ago. From three acts of birth in process, it also appears that Beegun Kugrattee became the mother of three children born respectively on 12th October 1879, on 15th April 1881, and 19th August 1883, in which acts of birth the mother and respondent stated that they were natural children and acknowledged with the mother's consent by the respondent who declared himself to be their father. Beegun Kugrattee died on the 11th May 1885 and Mahadoo the respondent thereafter presented a petition to the Master in the end of November 1885 in which he narrates that he was married to Beegun Kugrattee (who is the same person as the Beegun Kugrattee of the acts of Birth) according to the rites of the Mahomedan Religion and that when he married his concubine according to the rites of his religion he was not aware that she was lawfully married and prayed that he should be appointed Guardian of the three children above referred to; after referring this petition to the Ministère Public, Mahadoo was on the 8th December 1885 appointed guardian of his three natural children. This was done on the footing that they were illegitimate and in virtue of the provisions contained in Ord. No. 4 of 1871. On 14th December the children were ordered to be produced in the Master's

Court and on the 15th December 1885 the appellants having thus learned of the appointment of Mahadoo presented a petition praying for the recall and rescinding of the order appointing him as guardian. On 20th May 1886, the Acting Master of the Court refused to entertain the said petition, the issue raised in the case being the filiation and Civil Status of parties. From that judgment this appeal is brought.

The first question to be disposed of is a question of competency; for it was argued that it was incompetent for the Master to recall the order previously made by him. It appears to the Court that as the order appointing the respondent guardian was made *ex parte* and the petition to recall that order was presented the day after the fact came to the notice of the appellants, that this question of competency in truth resolves itself into a contested motion. Every functionary who has judicial duties to perform is entitled if he has pronounced an order in the absence of parties interested to recall that order *de recenti* and while matters are still entire, and decide the question raised in *foro contentioso*.

It is clear that if the second order given by the Master is sound in law, the first order was bad in law. The Court is not at present about to determine what the personal civil status of these children is, as they think that the grave questions raised by the facts of the case ought to be determined by a competent action. Some of the points that are raised by the facts of this case are the following: Who is entitled in law to challenge the legitimacy of these children? Ought the legal presumption *Pater est quem nuptiae demonstrant* to yield before the facts that may be proved in this case? These and other questions of equal gravity must be determined before the civil status of these children can be finally fixed and the Court, performing that which the

Master ought to have done, simply at present sustains the competency of the appellant's petition to the effect of recalling the order of 8th December 1885 and placing matters in *statu quo ante*, so that the civil status of these children may be competently settled. With costs to the appellants in this Court.

SUPREME COURT

APPEAL FROM CONVICTION OF A DISTRICT COURT.— INFORMATION AMENDED.— CONVICTION DID NOT MENTION THE FACT.— EVIDENCE INSUFFICIENT. — CONVICTION SENT BACK TO MAGISTRATE AND COMPLETED BY HIM.—THE AMENDMENT DID NOT ALTER THE NATURE OF THE CHARGE.— EVIDENCE SUFFICIENT TO GO TO A JURY.— GROUNDS OF APPEAL REJECTED.—APPEAL DISMISSED WITH COSTS

The Court was asked to quash a sentence of a District Magistrate on the following grounds:

1o. *An amendment of the Information had been allowed in the Court below.*

2o. *No mention of the fact appeared in the formal conviction drawn up after the appeal had been entered.*

8o. *The evidence did not justify the verdict and sentence.*

The Court overruled the first point because the amendment allowed did not alter the nature of the charge.

As to the second, the Court found that the Record which had been referred to the convicting Magistrate had now been returned with the formal conviction properly amended and put in shape.

As there was sufficient evidence to go to a jury, the Court overruled the third objection, and dismissed the appeal with costs.

—
BOLAS,—Appellant

versus

QUEEN.—Respondent

—
Before

His Honor E. J. LECLEZIO,—Chief Judge

and

His Honor G. C. MAYER.—Acting Puisne Judge

—
T. L. JENKINS,—Counsel for Appellant

V. DUCASSE,—Attorney for the same

J. M. GIBSON,—Counsel for Respondent

J. GUIBERT.—Attorney for the same.

—
Record No. 531.

9th August 1886.

This case is an appeal from a conviction of the Junior District Magistrate of Port Louis. The first point argued by the Counsel for the appellant was that the conviction should be quashed because the Court below had allowed the information on which the appellant was tried, to be amended. As the amendment which had been allowed did not alter the nature of the charge we set aside this first objection on the very day the appeal was heard.

The second point put forward was that after the amendment had been allowed no mention of the fact had been made in the formal conviction which was drawn up after

the accused had had sentence passed on him. On this account, following what had already been done in the case of *Gungee vs Reg*, Decisions Supreme Court 1861, we referred the record back to the convicting Magistrate and it has now been returned with the information and the formal conviction properly amended and put in shape. We find the alteration thus made in the papers perfectly in accordance with the minutes of the proceedings they are before us and we therefore sanction this amendment. Lastly it was urged that the evidence received by the Court below did not justify the verdict and sentence.

We have read the notes of the Magistrate carefully and find that there was sufficient evidence to go to a Jury and we therefore decline to interfere with the conviction.

Appeal dismissed with costs.

SUPREME COURT

—
WRIT OF INJUNCTION ISSUED.—SERVITUDE OF AQUEDUCT AND OF PASTURE ON A LAND IN FAVOUR OF AN ADJOINING LAND.—APPLICATION TO HAVE WRIT DISSOLVED.—SERVITUDE OF AQUEDUCT APPARENT AND CONTINUOUS.—SERVITUDE OF PASTURE DOES NOT SEEM TO HAVE BEEN CONTINUOUS.—WRIT DISSOLVED AS TO THE LATTER SERVITUDE AND MAINTAINED AS TO THE FORMER, PENDING DECISION IN THE PRINCIPAL ACTION RAISED.—NO COSTS.

A Writ of injunction had been issued restraining the plaintiff from diverting certain waters of a river which were conveyed to defendants' Estate through pipes laid on plaintiff's lands and further directing the latter not to hinder defendants from sending their cattle and oxen to graze on his said lands.

An application was made in order that the Writ should be dissolved at once to all intents and purposes with costs against the defendants jointly et in solido.

The Court considered that it resulted from the affidavits and other documents in process that a former proprietor seemed to have created a continuous and apparent servitude of aqueduct on plaintiff's land in favour of the defendants' Estate, and maintained the interdiction in regard to the use of the above waters until the rights of the parties were fully determined by the Court in the principal action raised.

As to the right of pasture, the Court thought (subject to the proof afterwards to be led in a competent action) that it had seemingly not been of a continuous character, and dissolved the writ with regard to it.

Each party to pay his own costs.

L. E. BOULLÉ,—Plaintiff

versus

Heirs VALLET,—Defendants

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor G. C. MAYER,—Acting Puisne Judge

Hon. L. ROUILLARD,—Counsel for plaintiff

V. BOULLÉ,—Attorney for the same

E. GALLET, Counsel for defendants

E. GANACHAUD,—Attorney for the same.

Record No. 23,591.

9th August 1886.

The plaintiff asks this Court to order and decree that the writ of injunction issued on

the 25th June 1886 at the request of Heirs Vallet should be dissolved at once to all intents and purposes with costs against the said heirs, jointly and in solido. The writ of injunction issued restrained the applicant Léonce François Boullé from diverting or causing to be diverted in any manner whatever the waters of the property St. Sauveur situate in the District of Black River and contiguous to the Estate "Belle Isle" and compelling the said Léonce Boullé to allow them to flow as they do now into the canals leading to the said Estate "Belle Isle" and further directing the said Boullé not to hinder the present owners of "Belle Isle" from sending their cattle and oxen to graze on the lands of the said property St. Sauveur until the Court shall have decided an action about to be entered by the heirs Vallet against the said Léonce Boullé and Aristide Boullé.

From the Affidavits in process it appears that Aristide Boullé, brother of the applicant was owner of two estates in Black River "Belle Isle" and "St. Sauveur". The former was mortgaged in favor of Louis Adolphe Vallet, the ancestor of the defendants and was put under sequestration in 1885, was seized and sold at the Master's Bar and adjudicated to the heirs Vallet for a sum smaller than their mortgage claim. On the same day as this adjudication was made, "St. Sauveur" having been mortgaged to plaintiff L. F. Boullé was by a deed under private signatures purchased by him from his brother Aristide Boullé for the sum due under the mortgage and the price was to be compensated by that sum if it suited the purchaser. It appears that each of the Estates was sold with its right to the waters of the River Belle Isle. The two estates are contiguous and "St. Sauveur" was purchased by Aristide Boullé in 1882, he having as is alleged previously leased it. Works appear to have been constructed by him by which the water from the Belle Isle

River was conducted by pipes across the estate of St Sauveur to irrigate the estate Belle Isle. It is alleged in the affidavits for the Respondents that the water from the river Belle Isle for the irrigation of the estate Belle Isle is indispensable and that if it be withdrawn 15 acres of canes would be at once entirely lost and the crop over the whole estate would be reduced by at least a half. This is admitted by the applicant. It is also stated by the respondents that the cattle and oxen of Belle Isle were accustomed to pasture on St Sauveur which was not in cultivation. In virtue of the provisions contained in article 1167 C. C. the respondents have further raised action against the applicant to cancel and declare void the deed under private signatures under which the applicant has become proprietor of St Sauveur.

Without expressing any opinion on the merits of that action or the final result of the claim made by the respondents for a servitude of aqueduct over St Sauveur and of pasturing cattle on it, we think it sufficient for the determination of the present question to say that in the former case a preceding proprietor has seemed to create a continuous and apparent servitude over St Sauveur in favor of Belle Isle while in the case of the latter alleged servitude it wants and must want that character of continuity, which is necessary to give a right by destination, with regard to the waters it is clear that the duty of the Court is to maintain the *status quo ante*, until the rights of parties are fully determined by the Court and equally clear that the alleged right of pasture is not of the same character, and subject to the proof that may hereafter be led in any competent action, was not continuous in its character, and it is difficult to see how after the two properties became separated a few years of occasional use of pasture while they were united in the person of one pro-

prietor can become a right. We therefore are of opinion that it is our duty to maintain the the interdict of 25th June last, in regard to the use of water coming from St Sauveur and to dissolve it in regard to the pasturing of the cattle and oxen, and we find no costs due either to or by one party to the other.

SUPREME COURT

APPEAL BY AN EMPLOYER FROM A DECISION OF A STIPENDIARY MAGISTRATE.—MINISTÈRE PUBLIC APPEARS FOR SERVANTS, RESPONDENTS—APPEAL DISMISSED.—MINISTÈRE PUBLIC ENTITLED TO COSTS.

The Substitute Procureur General appeared as counsel for certain servants in an appeal made by their employer from a judgment of a Stipendiary Court. and the appeal was dismissed.

Thereupon the appellant urged that no costs should be allowed as the case was not one in which the Crown is entitled to receive costs under Ordinance 12 of 1857.

The Court considering that under the Labour Law the appellant is bound to give security for the payment of "such costs as the Court may award on appeal" held that the costs in such appeals might be awarded either to the respondent himself or the Ministère Public.

As the Ministère Public had appeared here for the respondents, in virtue of Article 276 of Ordinance 12 of 1878, the Court considered that it was entitled to recover his costs from the appellants.

E. LEBLANC and ors — Appellants

versus

CASSEPIERRE and others—Respondents

—
Before

His Honor E. J. LECHEZIO,—Chief Judge,

and

His Honor A. MURE—Puisne Judge

—
F. MATHEWS—Counsel for Appellants

E. LEBLANC—Attorney for the same

J. M. GIBSON—Counsel for Respondent

J. GUIBERT—Attorney for the same:

Rerord No. 109

9th August 1886.

When the Court gave judgment in this case dismissing the appeal made against a judgment of the Stipendiary Court of Pamplemousses, the question of costs was reserved, at the request of the appellants, to be argued specially. The contention of the appellants is that no costs should be allowed because the respondents, who are servants did not appear by Counsel, that it was the Substitute Procureur General who argued in support of the Magistrate's decision and that this is not one of the cases in which the Crown is entitled to receive costs under Ordinance 12 of 1857.

There is no doubt that the present case does not come under Ordinance 12 of 1857, but we must examine the provisions of the Labour Law concerning appeals and see whether they do not contain sufficient authority for the Crown to claim costs here. Art. 272 of Ordinance 12 of 1878 deals with matters of appeal and after providing for the delay within which notice of appeal should be given to the Magistrate, it enacts as follows: "Upon which notices such Magistrates shall immediately

" bind the party so giving such notice by recognition to Her Majesty, her heirs and successors with sufficient security in a penal sum of double the amount of the penalty adjudged or sum awarded and the condition whereof shall be, that such party giving such notice of appeal shall appear and prosecute such appeal with due diligence to its conclusion before the above named Supreme Court, and pay such costs as the said Court may award in such appeal, such costs in no case to exceed Rs 50." And by art. 276 on such appeal being entered in the registry of the said Court and on the aforesaid proceedings being thereto transmitted, notice thereof shall be given by the registrar to the Procureur General and without any summons or order to that effect, the cause, if the respondent be a servant and not appearing by Counsel, shall *ex-officio* be set down for hearing between the Ministère Public and the appellant." It results in our opinion from these two articles read together that it was intended by the Legislature when it was made a condition precedent to the hearing of the appeal that the appellant should give security for the payment of "such costs as the Court may award on such appeal" that the costs might be awarded either to the respondents themselves or to the "Ministère Public" who, in certain cases, is bound to appear for them. We see no good reason why the appellants should be dispensed with the payment of the costs, for which he has given security he has lost his case after the argument of the Procureur General or of his Substitute appearing for servants too poor to fee counsel; it is admitted that if the respondents had been represented by Counsel paid by them the costs would have been due, we fail to perceive the difference which is sought to be established here. Article 272 makes none and it is in the same chapter as article 276 which foresees the

case in which the respondents are to be represented in Court by the "Ministère Public".

Holding, as we do, that the recognizance is given generally for the costs of the case, we are of opinion that the "Ministère Public," having appeared for the respondents in virtue of Art. 276 of Ordinance 12 of 1878, is entitled to recover his costs from the appellants.

SUPREME COURT

VOLUNTARY SALE BY LICITATION OF TWO SUGAR ESTATES.—DESCRIPTION OF TWO PLOTS OF GROUND OMITTED.—DEMAND THAT THE PLOTS OF GROUND BE LOOKED UPON AS SOLD.—VENDORS OF AGE CONSENT —GUARDIANS OF MINORS INSTRUCTED TO CONSENT.—JUDGMENT FOR PLAINTIFF.—THE NAME OF A MINOR INTRODUCED IN THE PROCEEDINGS.—VARIOUS JUDGMENTS BINDING UPON HIM.

In a sale by licitation of two Sugar Estates, the description of two plots of land had been left out of the Cahier des Charges.

The purchaser in his declaration asked the Court to decree that what was intended to be sold and what really had been sold and purchased was the whole of the two Estates including the above plots of ground.

The colicitants of age appeared in the case and supported the plaintiff's contention. Family councils held on behalf of the minor colicitants residing in this place authorised the guardians to appear also and admit the facts in the declaration and to say that there was no bar to the conclusions of this action being granted.

The Curator of Vacant Estates abided by the decision of the Court; and so did the Ministère Public in its conclusions.

The Court, under these circumstances, and considering specially that the licitation here had been a voluntary one, gave judgment in terms of the plaintiff's declaration.

In the second action, which was in a measure, connected with the first, the Court allowed the name of the minor, Henry Mazery to be introduced in certain proceedings in lieu and place of that of Elizabeth Mazery; and ruled that various judgments delivered be "jugements en déclaration commun" to him with the other parties.

Costs to be costs of licitation.

MAZERY & ors—Plaintiffs

versus

MAZERY & ors—Defendants

and

**LIÉNARD, plaintiff and MAZERY & ors
Defendants**

Before

His Honor A. MURE—Puisne Judge

and

**His Honor E. DIDIER ST. AMAND,—Acting
Puisne Judge**

G. GUIBERT—Counsel for Plaintiffs

H. LECLÉZIO & ors—Attorneys for the same

P. L. CHASTELLIER,—Counsel for defendants

G. A. RITTER & ors—Attorneys for the same

Record No. 23601.

11th August 1886.

His Honor Mr Justice Mure.

We have carefully read the papers and considered the procedure adopted in this

matter, which being unusual is of some importance and the first judgment which must be pronounced is an interlocutory order directing the record in the case of *Lienard vs Mazery* in which case we will allow a necessary amendment. The declaration will be amended by striking out the name of the minor Elizabeth Mazery and inserting therein the name of Henri Mazery.

The question then arises as to what should be done on the merits of both these actions. The one action refers to two portions of land which had been omitted by mistake from the Cahier des Charges of the sale of a large Estate, the one consisting of 25 acres and 25 perches and the other of 11 acres and 33 perches both purchased by the proprietor of "Deep River" and "La Louise" Estates at the levy of the Estates of a person called Florent; and they were adjudged to certain of the proprietors of one portion of these estates and brought into the whole Estate so far back as the year 1863.

It appears that the sales of these two portions of land though they were registered, had not been transcribed and it is not surprising that in the proceedings of sale there was an omission of the description of these particular subjects, but there can be no doubt that the Cahier des Charges intended to sell the whole estate under the heading of the description of properties there in "Deep River" and "La Louise" situated in the district of Flacq "composed of the following properties which are worked together as one estate." It was therefore intended to sell the whole estates of "Deep River" and "La Louise" it being stated that they were worked together as one estate and the omission of those portions of land which have been mentioned has been satisfactorily explained. On this omission being discovered the procedure adopted has been the following: all the parties who were major

have been communicated with and they have all lodged defences to the action admitting that the facts are as stated and have no objection to urge against the plaintiff's demand, the Curator of vacant Estates abides by the decision of the Court and then finally councils have been held of almost all the minors who resided in the Island—under which their guardians were authorized to admit the facts stated in the declaration and to say that there is no bar to the conclusions of this action being granted. We therefore, considering that this was a licitation—and I make that restriction in my remarks—that this was a voluntary licitation proceeded on before the Master's Court and that we have the whole of the parties interested consenting to this procedure, and having the conclusions of the "Ministère Public" abiding by the decision of the Court—We are of opinion that we may give judgment decreeing that these two portions of land do form part of the estate "Deep River" and "La Louise" and that they were intended to be sold in the licitation thereof, that the plaintiff is the owner of the said portions of land and of the estate in virtue of the adjudication made to him on the 11th of March 1886. The other action in which the Court is asked to decree that the name of one of the minors, a person called Elisabeth Mazery should disappear from the various processes both in this Court and in the Master's Court, the action in dissolution of partnership and the other procedures, and that the name of the minor Louis Marie Henri Mazery should appear in them, and that the various judgments be "*jugements en déclaration commun*" to him with the other parties. In this matter we have the procedure of the French Courts in which this is an undoubted form of process and which we have carefully considered,—for the procedure here adopted many authorities in the French Courts might be quoted—We have

no doubt that the decree asked in this declaration may be granted by the Court and we therefore give judgment in the terms of the conclusions of the declaration.

The costs will be costs of liquidation.

SUPREME COURT

ACTION IN REDDITION OF ACCOUNTS AND IN DAMAGES BY A PRINCIPAL AGAINST HIS AGENTS.—ALL THE PARTIES “COMMERÇANTS” DURING THE CONTRACT OF AGENCY — THE ACTION, A COMMERCIAL ONE.—THE DEMAND FOR PAYMENT OF DAMAGES SUBSIDIARY TO THAT OF REDDITION OF ACCOUNTS AND THEREFORE COMMERCIAL ALSO.—SUCH ACTION SUBJECT TO THE TEN YEARS PRESCRIPTION. — ORD. 16 OF 1883, ART. 6. — SUCH ACTION TO BE ENTERED WHEN THE CONTRACT OF AGENCY HAS TERMINATED.—CONTRACT ENDED IN 1876.—ACTION ENTERED IN TIME.—PRINCIPAL ACTION ONLY WILL INTERRUPT PRESCRIPTION AND NOT MERE NOTICES OR OTHER PROCESS OF A PRELIMINARY CHARACTER.

The plaintiff in this case asked the Court to decree that an account rendered to him by the defendants, his agents, was not a true and correct one ; that a sum of Rs 12,000 was due to him under that account, and also a further sum of Rs 15,000 as damages.

The defendants pleaded, inter alia, that the action being a commercial one, was barred by the ten years prescription under Ord. 16 of 1883.

The Court considering that at the time the transactions in the case mentioned took place between the parties, both of them were “commerçants” held that this was a commercial action.

That the demand for damages was merely subsidiary to that in reddition of accounts in the same declaration, and was therefore a commercial one like the principal demand, and that therefore the whole was subject to the 10 years prescription under Ord. 16 of 1883, increased by two years in virtue of article 6.

But, considering that the plaintiff was entitled to bring his action only when the contract of agency had terminated and that, as shown by an account produced by the defendants in August 1876 or in December of the same year when the balance was struck, the Court ruled that the action had not been raised after the prescribed period.

Held further that in order to interrupt prescription a mise en demeure or other process of a preliminary nature is not sufficient ; that there must be a principal action actually raised and served upon the opposite party.

BÈGUE,—Plaintiff

versus

HOUDLETTE & Co.—Defendants

Before

His Honor A. MURE,—Puisne Judge

and

His Honor G. C. MAYER, — Acting Puisne Judge

F. MATHEWS,—Counsel for Plaintiff

W. LEBLANC,—Attorney for the same.

The Honorable L. ROUILLARD,—Counsel for Defendants

P. E. DE CHAZAL,—Attorney for the same.

Record No. 23,280.

12th August 1886.

His Honor Mr. Justice Mure :

This is a case which is raised by a party in *forma pauperis* against a Company carrying on business in this town of Port Louis; and as the action is raised by a man who litigates as a pauper it is of the gravest importance that the defendants should have every point which is pleaded by them carefully considered by the court.

My learned brother and I, having carefully considered the matter, have now to deliver our Judgment upon a point which was argued before us on Thursday last, which is to the effect that this action is barred by a prescription of ten years.

The circumstances in which that plea is taken are these: The plaintiff's declaration begins by narrating that in the month of August 1873 a deed was drawn up and passed before Mr. Notary Durand Deslongrais by which he purchased a schooner called "La Bretagne" for Rs 7200 paid cash. He goes on to say that the "Bretagne" was purchased with the object of trading between Mauritius and La Réunion. He then says that in August 1873 he handed over to the defendants two drafts for 22,375 francs, and that these drafts were drawn upon some person in Reunion, and as we shall afterwards see, that they would have been accepted but for the conduct of the defendants. He further alleges that the defendants have received the amount of a policy of insurance and it is noticeable that about this allegation in the plaintiff's declaration there is no date whatever assigned to it. He goes on to say that there was a *mise en demeure* served on the defendants on the 14th September 1885 to supply him with a true account and reliable vouchers.

That *mise en demeure* was answered on the 22nd of September and an account was handed shewing the plaintiff to be indebted to the defendants in Rs. 12723.60. The action does not stop there: it proceeds to make allegations applicable to an alleged claim of damages, after denying that the account is a correct one he says that the defendants bound themselves to forward along with the said two drafts the deed of purchase of the "Bretagne" and all the documents connected with that purchase, so that he might register the ship in his own name and if he so wished, sell it at a profit.

He alleges that they neglected to do that, that he could not register the ship or procure money on it, and that in consequence of the want of these documents, his drafts were dishonored, and that the Credit Agricole of Bourbon, the agents of the Oriental Bank Corporation here, brought an action against him in the Courts of Bourbon under which they got judgment and that the ship was seized and sold on the 5th of November 1873 at the price of 22,375 francs. He says that at the time the ship was seized there were 55 tons of perishable goods on board and 50 tons of other goods waiting to be put on board, and he concludes his action by asking in the first place for a decree of this Court that the account rendered is not a correct one; in the second place that the sum of Rs. 12000 is due to him by the defendants and in the third place for damages to the extent of Rs. 15000. Now the plea to this action which was discussed before us was to the effect that the action was barred by the prescription of ten years, it being a Commercial action. In considering this plea we have to notice that the defendants themselves have produced in the process the account between them and the plaintiff, which we see begins on the 6th of August 1873 with a payment by the defendants to Mr. Notary Durand Deslongrais of \$ 3050, it goes on

through various years with credit and debit amounts until it closes with a last item on August 31st 1876 with a payment by the defendants on account of the plaintiff of a sum of \$ 20 and the balance is struck on the last day of the year 1876 by bringing out a sum of Rs. 12723.64 as due to them by the plaintiff.

Now it is perfectly clear that an action of this character is one of great importance to the defendants and I am not surprised that this point should be very anxiously pleaded.

The question undoubtedly was very ably argued on both sides as to the nature of the prescription which is established by Ordinance 16 of 1883, the first section of which is to the effect that all Commercial actions shall be barred by prescription after ten years.

I think it is clear by the law of France that an action under that branch of the law, which is called the law of Mandate, whether in the Civil or the Commercial Court of that Country does not prescribe under a period of 30 years, there seems to be no authority whatever for supposing that a shorter prescription applies to actions of this nature by the law of France.

There was a grave question argued here as to whether the action ought to be called a Commercial one or not. Looking to the fact that the parties at the date when these transactions took place were what is called in French law "*Commerçants*," that is in trade, and that the matters between them were also matters of trade, there is, we think, no doubt that this action is a Commercial one. A subsidiary question arises as to the position of the second conclusion in this declaration, viz: the action of damages, but it was conceded on both sides of the bar that the one action merged into the other and certainly after consideration, although at first, it seemed to

me to be a strange thing to hold an action for damages to be a commercial action, still if the matter has arisen out of Commerce and trade I now see no reason to doubt that we should hold it to be a Commercial action. At any rate, we may admit this, that when such an action is added to another principal action, such as the one here, which is one asking for a reddition of accounts and when the action for damages is merely a subsidiary action to it, we think that the whole question may be dealt with as a Commercial one.

We have no doubt then, that this action ought to be considered as a commercial action and that it is in virtue of the Ordinance No. 16 of 1883 subject to this prescription of ten years, which is increased to two years more by article 6, the transition clause of the Ordinance and we have then to consider whether in reality this action is one which falls under that prescription of twelve years.

Now it was maintained, on the one hand by the defendants' counsel that the whole matter was to be determined from the allegations made by the plaintiff in his declaration and that we could only look at the declaration as disclosing the point at which the obligation to account arose. On the other hand it was contended that the defendants had here produced an account extending over a period of three years beginning in August 1873 and ending on the 31st December 1876 or if we take the last item, it ends on the 31st of August 1876, with the payment of \$ 20. Now that account is a continuous account during the period of three years and when an agent acts in that way for a *mandant* in the position and relation in which Begue and Houdlette and Co. stood towards each other, it seems to us to be impossible to separate the items of that account and to make the prescription run from each particular item of it and that the true manner of determining

this question is to consider when the obligation to account arose ; when was Begue entitled to bring his action for reddition of accounts against the defendants ? certainly not until the agency in respect to which they had been employed was completed, and, as I may say, had come to an end.

Now applying that principle to this action, we cannot hold here that the action has been raised after the prescribed period. Before closing my remarks, I think it is right that I should say in consequence of some of the points that were pleaded to us by the plaintiff's Counsel, that we consider the action referred to by this Ordinance must be a principal action actually raised and served upon the opposite party, and that the preliminary skirmishing, the "mise en demeure" and various other things, correspondence &c, shewing the intention to raise the action, is not sufficient for the purpose for which it was pleaded. There must be an action and a principal action served on the opposite party in order to take advantage of the prescription. But here if we take into account the transactions between the parties which bring us down to August 1876, it is quite within the period of time of twelve years which the Ordinance allows in the present case, the ten years were not expired when it began, it was within the necessary time and therefore we must disallow this exception and order the action to proceed.

SUPREME COURT

APPEAL FROM A JUDGMENT OF A DISTRICT COURT.—COMMERCIAL CASE.—FRAUDULENT MANŒUVRES—DISCRETIONARY POWER OF A COURT OF FIRST INSTANCE—COURT OF APPEAL TO APPRECIATE THE USE MADE OF THAT POWER.—INDICATIONS OF FRAUDULENT MANŒUVRES.—APPEAL ADMITTED.

— CASE REMITTED TO DISTRICT COURT TO HEAR WITNESSES.

The appellant claimed before a District Court the payment of a Bon signed with a cross and the seizure of a mule and cart for the part of payment of which the Bon had been given. This claim was met by the production by the Respondent of a bill of sale signed by the appellant in which this latter recognized that the whole amount of the purchase price of the mule and cart had been paid cash.

The appellant subsequently urged that fraudulent manœuvres had been practised upon him at the time he was made to accept the Bon and he urged, further, that the case was a commercial one.

The Magistrate declined to hear oral evidence.

Held on appeal :

10. *That this is a commercial case.*
20. *That though in commercial cases the Magistrate has a discretionary power to hear or not oral evidence, it lies with the Court of Appeal to see whether that discretionary power has been well used.*
30. *That in this case there were pretty strong indications of the fraudulent manœuvres complained of by the appellant.*
40. *That for these reasons the Magistrate should have heard the oral evidence tendered.*

The appeal was admitted with costs and the case remitted to the District Court to hear witnesses.

—
MANQODASS—Appellant

versus

PEMSING—Respondent

—
Before

His Honor E. J. LECLERCQ,—Chief Judge.

And

His Honor G. C. MAYER—Acting Puisne Judge

W. NEWTON,—Counsel for Appellant
A. PITOT—Attorney for the same

A. HUGUES—Counsel for Respondent
V. MARJOLIN—Attorney for the same.

Record No. 865.

19th August 1886.

His Honor Mr. JUSTICE MAYER.

This is an appeal from a judgment of the District Magistrate of Plaines Wilhems. From the statements that we have had before us it would appear that Manoodass, the plaintiff before the District Court, had sold a mule and cart and also a harness to Pemsing the defendant and the respondent here. A bill of sale was drawn up at the time that the sale took place and in that bill of sale it is stated that the whole price of the articles sold has been paid cash but it was also stated that when this bill of sale had been made a sort of *contrelettre* was given to justify the statement that payment had been paid cash. It would appear that a certain amount has been paid cash and the balance which amounted to Rs 270 had been paid by means of a "bon" to which Pemsing had only put his cross.

Subsequently Pemsing transferred the mule and cart to his concubine by means of a regular deed. When Manoodass discovered this he felt afraid that he might lose all chance of recovering any thing from Pemsing in as much as he became aware that the *bon* was in itself worthless and he therefore entered an action before the District Court and asked for the seizure of the articles and the animal sold. There, when he attempted to put in evidence the "bon" which was marked only with a cross he was met with the objection that there was no signature to it, that there was no proof that it emanated from Pemsing and therefore that it could not be produced.

He then fell back upon the fact that this was a Commercial action and asked leave to adduce oral testimony to prove what had taken place at the time, between himself and Pemsing.

This it appears gave rise to a discussion, the result of which was that the Magistrate allowed Pemsing to be heard on his personal answers, to shew whether or not he was a trader, and whether or not the transaction was of a commercial nature. A witness was heard and although the Magistrate does not give details or any reason for his judgment we are bound to come to the conclusion that he must have thought this was not a commercial case for he purely and simply refuses to admit oral testimony. Thereupon Manoodass not being able to go on with his case judgment was given against him and now the case comes before us on appeal.

The principal point argued here was that this being a commercial case oral evidence should have been admitted. That has been met by the objection that although oral evidence may be admitted in commercial matters yet in this particular case the Magistrate was perfectly right in not admitting it. The respondent we think is perfectly correct in his view of the law when he says that it is in the discretion of Courts of Justice to admit or reject oral evidence in commercial cases. The text of article 109 of the Commercial Code clearly says that oral testimony is not admitted " Dans le cas où le tribunal doit l'admettre " Therefore the question is left entirely to the discretionary power of the Magistrate or of the Court of Justice. In this particular case we have in the bill of sale itself and also in the affidavit sworn by Manoodass a clear allegation of fraud and we are of opinion that the Magistrate must have labored under apprehension of the case when he came to the conclusion that oral evidence should not be admitted.

conclusion that the case was not a commercial case, and on account of the allegations of fraud contained in the plaint he should have enquired a little further into the details of the case itself. It is on that account that we will refer back the record to the Magistrate calling on him to admit oral testimony and to try the case on its merits.

His Honor the Chief Judge :

I entirely agree in the decision come to by my learned brother and I wish only to add a few words with regard to the discretionary power of the Court.

There is no doubt that according to the text of the Code even in Commercial cases the Court has the discretionary power of allowing oral evidence according to the nature of the circumstances. But, on the other hand when the case comes on appeal before the Supreme Court there is no doubt also that this Court is entitled in reviewing the judgment to examine whether the Magistrate has wisely exercised his discretion, because there may be circumstances tending to shew that there has been a mistake or misapprehension on the part of the Magistrate. Now here, it is clear in the first place that with regard to the nature of the case there was a misapprehension on his part. The transaction which took place was clearly a commercial one, and secondly there are certain circumstances in this case which also lead us to the conclusion that he should have allowed parole evidence. My learned brother has already made allusion to the specific acts of fraud which were alleged both in the plaint and in the affidavit of the now appellant.

But we see also that the two documents in question to all appearances must have been written on the same day, therefore it would have been wise on the part of the Magistrate

to hear witnesses as to what took place on that day. We see that those two sheets of paper bear the same date (day month and year) on the stamp and besides they both appear from certain parts to have been divided from the same double sheet. Taking into consideration all these circumstances we think the appeal should be admitted with costs and that the case should be referred back to the Magistrate in order that he should hear witnesses.

SUPREME COURT

PORT-LOUIS

"SECURITY JUDICATUM SOLVI".—MONEY PAID IN THE REGISTRY.—PART OF THE MONEY ABSORBED BY COSTS ON INCIDENTS—APPLICATION TO HAVE A FURTHER SUM PAID.—EQUITABLE POWERS OF THE COURT—ARTS. 16, CODE CIVIL.—ARTS. 166 & 167, CODE DE PROCÉDURE CIVILE.—ENGLISH AUTHORITIES.—NO POWER IN THE COURT TO STOP LITIGATION AND CONSEQUENTLY TO ORDER PAYMENT OF A FURTHER SUM OF MONEY.—ENGLISH AUTHORITIES DO NOT APPLY.—MOTION REFUSED.

The plaintiff, a foreigner, had been ordered to deposit and had deposited in the Registry of the Supreme Court a sum of Rs 750 as a security judicatum solvi.

An application was subsequently made in order that an additional sum of Rs 750 should be ordered to be deposited in as much as there was only a balance left on the first deposit which had been partly absorbed by costs paid by the plaintiff on certain incidental matters.

The Court was of opinion, considering articles 16 Code Civil, and 166 and 167 of the Code of Civil Procedure :

10. *That the law does not contain any authority which could enable them to stop litigation which would be the natural consequence of an order that plaintiff should deposit a further sum, if that order were not carried out.*

20. *That in presence of a precise text as that of the above Articles 16, 166 and 167, the Court would not be justified to have recourse to the equitable powers vested in them.*

30. *That English authorities cannot be invoked in a matter in which articles of the Code Civil and Code of Civil Procedure are to be interpreted.*

The motion was refused with costs.

IN RE :

CRÉCY DE LANUX—Plaintiff,

versus

P. BOYER DE LA GIRODAY—Defendant

and

CRÉCY DE LANUX,—Plaintiff

versus

F. BOYER DE LA GIRODAY—Defendant

and

P. BOYER DE LA GIRODAY,—Plaintiff,

versus

CRÉCY DE LANUX,—Defendant

and

F. BOYER DE LA GIRODAY—Plaintiff,

versus

CRÉCY DE LANUX,—Defendant.

Before

His Honor E. J. LECLÉZIO,—Chief Judge,

and

His Honor A. MURE,—Puisne Judge

G. V. KIVERN & I. JOLLIVET,—Counsel for
plaintiff

A. DESVEAUX,—Attorney for the same

W. NEWTON, } Counsel for Defendant
E. GALLET, }

G. KÖNIG,—Attorney for the same.

Record Nos. 23,608 & 23 609.

27th August 1886,

His Honor the Chief Judge.

These are two applications made by the defendants in the main actions for the purpose of obtaining from the Court an order that the plaintiff should deposit in the Registry of the Supreme Court,—“ An additional sum “ of Rs 750 as security *judicatum solvi* in the “ above matter in as much as out of the sum “ of Rs 750 already deposited there is only a “ balance remaining on account of certain “ costs on incidental matters which have been “ paid to the defendants.”

This is the first time that a motion of this nature is made to the Court, and therefore we have examined the authorities quoted to us with great care and given the best consideration to the arguments addressed to us. The motion is made in virtue of article 16 of the Civil Code coupled with articles 166 and 167 of the Code of Civil Procedure, and certain commentators and also two “ arrêts ” of the Courts in France were quoted to us in support of the applications. In this case the security was a sum that was deposited in virtue of article 167 of the Code of Civil Procedure which has no doubt added something to

article 16 of the Civil Code. Article 16 speaks merely of the right to obtain from the plaintiff when he is a foreigner, in matters other than commercial matters, a security for the payment of the costs and damages resulting from the action, unless he possesses certain Immoveable properties to secure the payment of those costs. Now by article 167 of the Code of Civil procedure there is something more which has been added to article 16. The clause runs thus "Le jugement qui ordonnera la caution fixera la somme jusqu'à concurrence de laquelle elle sera fournie; le demandeur qui consignera cette somme ou qui justifiera que ses immeubles situés en France sont suffisants pour en répondre, sera dispensé de fournir caution."

Now in this case the plaintiff has been ordered to deposit a certain sum—a sum of Rs 750 in each case, so in virtue of that article he has been dispensed with furnishing security. The question is now to know whether we have the right to order the plaintiff because of the incidents that have occurred before the Master to whom the cases have been referred for computation of accounts, to deposit a further sum—and if we have that right as a consequence must we order the litigation to be stopped in case the further sum be not deposited. Now have we the right to stop a litigation which has been begun if the plaintiff is unable to furnish the security? In the text of the law we find no authority at all which could enable the Court to stop the litigation. It would only be then from our equitable powers that we could derive such authority to stop a litigation which has been begun under certain conditions; but have we the right to use our equitable powers when we are in presence of a precise text of Our Law? There is an "arrêt" of the Court of Metz of the 13th March 1821 which has been quoted to us—and that arrêt is especially grounded upon this principle, that the security must be a complete guarantee, to the defendant when

the plaintiff is a foreigner for all the costs made until the end of the suit—but on the other hand we find in a commentator who is considered as a very sound authority, Mr Ooin de Lisle, another principle which appears to us to be quite as serious and quite as equitable as the one which is invoked by the Court of Metz. Mr. Coin de Lisle says in his commentary of article 16 of Civil Code, Section 16. "Sous un rapport serait-il loyal qu'après la fixation *pure et simple* d'une somme moyennant laquelle on accorderait à l'étranger le droit de plaider, on vint interrompre le procès sous-prétexte d'insuffisance? Non, on allègue en vain l'intérêt de l'étranger qui aurait ainsi la faculté de consigner par parcelles. Son intérêt véritable c'est de connaître dès l'abord les conditions du combat &c."

In presence of those two principles, which are equally serious, we could only do one thing, that is to examine the text of the law and after having examined it we must come to the conclusion that the law does not contain any authority which can enable us to stop litigation in such circumstances, and as I have already said, the natural consequence of an order of the Court to the effect that the plaintiff should deposit a further sum would be, as a corollary, the stopping of that litigation if the sum were not deposited.

Something was said about an implied reservation which existed in the judgment of the Court. We cannot adopt that view at all. We see no implied reservations in the judgment. A fixed sum has been ordered to be deposited in lieu of security for the costs and with regard to that question of implied reservation I wish to say something about the "arrêt" of the Court of Cassation which has been quoted as being in favor of the theory of implied reservation. That "arrêt" of the Court of Cassation does not at all appear to us to be in

favor of that view, for we see in that "arrêt" which is of the "12 Nivose an 12" there was a provision which declared that the security which was then given was "provisoirement suffisante" and as Mr Coin de Lisle says, it is clear that as it was "provisoirement suffisante" there was then an express reservation to have it completed in case of need. That would tend to shew, unless there are some words in the judgment which can entitle the Court to increase the security, that there can be no implied reservation especially in a judgment which fixes a determined sum to be deposited in lieu of security. With regard to the English authorities that have been quoted to us, I think that they cannot be invoked in a matter in which we have to interpret articles of the "Code Civil" and of the Code of Civil procedure. Here we have to interpret the meaning of article 167 of Code of C. Proc. coupled with article 16 of the Civil Code.

I do not think that the English authorities which have been quoted go the length of allowing a Court of Justice to stop litigation in similar matters. Some of the authorities quoted say that there must be very strong grounds to induce the Court to order an additional security, in one of them, the Court has refused to order other securities when those given had become insolvent.

There is however a case in which litigation was ordered to be stopped, but it was not at all a case similar to the present one. It was the case of the Mayor and Borough of Southampton versus the Commissioners of the Harbour of Southampton reported in Law Journal Vol. 34. In that case the security given was not by the plaintiff to the defendant, it was a case in which certain rate payers had used the name of the Corporation of Southampton in order to enter an action against the commissioners of the Harbour. Now in order to obtain leave to use the name

of the Corporation they had agreed to give security for an indemnity to that Corporation in case the Corporation was condemned to pay costs to the defendants, but it was not the defendant that had applied to have security for costs against the plaintiff, that was a special contract between the Corporation and certain rate payers of that borough. In that special case the Court ruled that the indemnity proving to be sufficient at a certain moment, the rate payers who had used the name of the Corporation in order to enter the action would be bound to furnish additional security to that Corporation, but that is not at all a case of security for costs as between a plaintiff and a defendant, and therefore, we do not think that that authority could apply in the case now before us, even if we were disposed to consult English authorities on this point.

For the reasons which I have given I am of opinion that the motion should be refused and refused with costs.

SUPREME COURT

VALIDITY OF ATTACHMENT.—*CESSIO BONORUM OF DEBTOR.*—ARRANGEMENT WITH CREDITORS.—DEBTS TO BE PAID IN FOUR INSTALMENTS FROM A CERTAIN DATE.—DATES AND AMOUNT OF INSTALMENTS NOT SPECIFIED.—ATTACHMENTS SET ASIDE WITH COSTS.

The plaintiff had attached in the hands of a third party certain sums due to the defendant.

The defendant moved for the setting aside of the attachment on the ground that he had made an arrangement, binding upon the plaintiff, with his creditors to the effect that

he would pay them in full discharge 50 o/o of their claims in four instalments, and that neither the amount nor the dates for paying the said instalments had yet been fixed by the said creditors.

The Court upheld the defendant's contention, and ruled that the only course left to the plaintiff was to apply to the Court of Bankruptcy to have the arrangement either completed or set aside.

The attachment was set aside with costs.

FORGET—Plaintiff

versus

LAURENT—Defendant

Before

His Honor E. J. LECLÉZIO,—Chief Judge
and

His Honor E. DIDIER ST AMAND,—Acting
Puisne Judge

H. GALÉA,—Counsel for Plaintiff,
W. H. EDWARDS,—Attorney for the same.

The Honorable L. ROUILLARD,—Counsel for
Defendant,

E. LAURENT,—Attorney for the same.

Record No. 23,672.

13th September 1886.

The plaintiff is the bearer of four promissory notes of the aggregate amount of Rs. 3,935.92c. subscribed by the defendant and which fell due in the first part of 1868.

On the 17th August last the plaintiff lodged an attachment with Goolab and ors who had been condemned to pay costs in a case they had against Pougnet, and in which the Court had allowed a "distraction" in favor of the defendant who had acted as Pougnet's attorney at law.

When called in Chambers for the validity of the attachment the defendant objected and the case was referred to Court.

It appears that in March 1868 the defendant filed a petition for a "cessio bonorum" and in May of the same year an arrangement proposed by him was accepted by the majority of his creditors and confirmed by the Court of Insolvency.

In that arrangement it is stated as follows :
" M. Laurent demande à ses créanciers de leur payer 50 o/o de leurs créances sans intérêts en quatre termes à partir du 15 Décembre 1870. Les créanciers soussignés consentent à cette demande &c."

The plaintiff admits that altho' he did not sign the arrangement he is bound by it, but he contends that as he has not received any part of the fifty per cent promised by the defendant he is entitled to lodge an attachment in order to obtain payment of what is due to him under the arrangement. His interpretation of the arrangement is that the first instalment became due on the 15th December 1870 and that no stipulation having been made as to the other instalments, it should be considered that the intention of the debtor and of the creditors was that the instalments were to become due successively on the 15th December of the ensuing years and also that each instalment was to be of an equal value.

The defendant, on the other hand, says that it was intended that he should be completely free from all anxieties until the 15th

December 1870 and that at that date the creditors were to meet again in order to fix not only the dates of the instalments but also the amount of such instalment and in support of this interpretation he quotes the preamble of the arrangement in which it is stated that he is utterly ruined and that his only means of livelihood is the practice of his profession as an attorney at law and "pour exercer cette profession avec quelque chance de succès il est indispensable de ne pas être menacé de poursuites qui font perdre la confiance des clients et la tranquillité d'esprit qu'exige la conduite des affaires litigieuses" — and the defendant contends that the creditors having acquiesced in an arrangement worded in such terms, it shows that they wanted to know what profits he could make by his practice before they determined the dates and amounts of the instalments.

There is no doubt that the terms of the arrangement are vague and uncertain and it is possible that the interpretation given to it by the defendant is the correct one,

But assuming as the plaintiff says that the first instalment was to become due on the 15th December 1870, what was its quantum? we cannot certainly now fill up what is wanting in the arrangement and such as it stands it appears to us to be incomplete. There was an incidental application for leave to prove by witnesses that another creditor had received certain sums from the defendant, but we fail to see what influence that fact, if proved, would have on the interpretation of the arrangement, it would only show that some private agreement took place between that creditor and the defendant to the prejudice of the other creditors and the plaintiff may be entitled to bring this to the notice of the Court of Bankruptcy. Upon the whole we are of opinion that the only course left to the plaintiff is to apply to the Court of Bankruptcy to have the arrangement

either completed or set aside. We were asked in case we arrived at this conclusion to stay the proceedings in validity until the Court of Bankruptcy had given its decision upon the matter; this, we think, we cannot do under the circumstances. The plaintiff chose to seek to obtain payment of his claim by means of a remedy which it was not in his power to employ so long as he was in presence of an arrangement such as the present one, he has adopted a wrong procedure, it is certainly his own fault if he has remained so long without taking proper steps to have the arrangement completed or annulled and he must bear the consequences.

We must therefore refuse the validity prayed for with costs.

SUPREME COURT

MORTGAGE CLAIM.—PROPERTY SEIZED.—OBJECTIONS TO SALE BEFORE THE MASTER.—ACTION IN NULLITY ENTERED BEFORE SUPREME COURT.—SALE POSTPONED SINE DIE.—CONCURRENT JURISDICTION OF SUPREME COURT.—TEN YEARS PRESCRIPTION.—ORD. 15 OF 1878, SECT. 35.—PRESCRIPTION OF MORTGAGE AS WELL AS OF RIGHT OF OWNERSHIP.—ACTION TO BE ENTERED WITHIN DELAYS OF THE ORDINANCE.—HOLDERS OF PROPERTY PRESCRIBE AGAINST ALL THE WORLD ALL KINDS OF CLAIMS.—NO BAD FAITH.—PROCEEDINGS SET ASIDE WITH COSTS.

The defendant, alleging herself to be a mortgage creditor of her late father's and guardian's estate and succession, seized a certain immoveable property belonging to plaintiff which the latter had purchased from the said father and guardian.

The property was put up for sale before the Master's Court, and therefore plaintiff's attorney entered at the foot of the Memorandum of charges certain objections which under Ord: 19 of 1868 were to be disposed of on the day of the sale.

On that day, however, the plaintiff prayed for a postponment of the sale sine die on account of an action which had been begun before the Supreme Court by plaintiff against defendant, and the latter made no objection to the motion which was granted.

Before the Supreme Court it was urged 1o. that the Master was alone competent to try nullities in the proceedings as well as nullities affecting the essence of the claim upon which the proceedings were based.

Held that the Supreme Court by its very constitution was invested with full original jurisdiction to hear, conduct and pass decisions in all civil suits and that there existed no text of law which granted to the Master exclusive powers of jurisdiction in cases like the present; and that the parties themselves had, here, agreed to which of the two Courts the questions to be decided should be submitted.

Upon the question of ten years' prescription urged by plaintiffs against the defendant's claim, it was ruled that the defendant having become of age previous to the passing of Ord. 15 of 1878, she should have exercised any rights she might pretend to have within two years after the promulgation of the said Ordinance.

Held, further, that according to the true interpretation of the above Section 35, those who have possessed an immoveable property for 10, 20. or 30 years, under the conditions required by the law, have a right against every kind of claim as against all the world,

unless the claim is exercised within the delays fixed by Ord. 15 of 1878.

It was considered that there was no reason for coming to the conclusion in this case that the purchaser of the land had not bought in good faith.

The commandements, seizure and other proceedings were set aside with costs.

—
DELBOR & ANOR,—Plaintiffs

versus

MARTIAL & wife,—Defendants.

—
Before

His Honor A. MURE — Puisne Judge

and

His Honor E. DIDIER ST. AMAND,—Acting
Puisne Judge

—
W. NEWTON.—Counsel for plaintiffs

H. BERTIN,—Attorney for the same.

H. GALÉA,—Counsel for defendants

L. WOHRNITZ,—Attorney for the same.

—
Record No. 23327.

14th September 1886.

On the fifteenth of May 1857 Delbor bought from Jean Baptiste Paul Mélidor Chéron a plot of ground of one acre and forty perches situate in the district of Plaines Wilhems. On the 23rd of November of the same year he sold to Zéline Joseph the bare ownership of the said plot of ground, which at her death passed to her children who with Delbor are plaintiffs in this case,

Noémie Chéron, the wife of Fébure Martial, alleging herself to be creditor of the succession of her father Jean Baptiste Mélidor Chéron, who died in September 1884, served "commandements" on the plaintiffs and on the 23rd of October 1885, caused the aforesaid land to be seized and entered proceedings before the Master's Court for the forced sale thereof in order to obtain payment of her claims. The memorandum of the charges and conditions of sale was filed on the 20th of November 1885 and the final sale was fixed for the 7th of January 1886. The property being valued under Rs. 6,000, Mr. Bertin, the attorney for the plaintiffs, who were defendants in the Master's Court, entered on the 10th of December 1885, at the foot of the said memorandum certain objections which Ord. 19 of 1868 requires to be disposed of on the day of the sale. On the 7th of January 1886, however, Mr. Bertin prayed for a postponement *sine die* on account of an action which had been begun before the Supreme Court against Mrs. Martial by Delbor and the heirs of Zéline Joseph. Mr. attorney Whorntz for Mrs. Martial, having no objection the sale and adjudication were postponed *sine die*.

The action thus referred to, is the one now submitted for our consideration in which Delbor and the heirs of Zéline Joseph ask the Court to declare null and void the "Commandements" and seizures made in October last and all the proceedings taken subsequently. For Mrs. Martial it is argued that the Master's Court having been first moved and the Master being alone competent to try nullities in the proceedings as well as nullities which affect the essence of the claim upon which the proceedings are taken, the incidents connected with this sale which has been begun before the Master's Court cannot now be brought before the Supreme Court in the shape of a principal action, that plaintiffs have mistaken the course they had to follow, that

they must be nonsuited with costs, and, the matter at issue between parties finally adjudicated upon by the Master, as being a nullity in a sale, on the objections entered at the foot of the memorandum of charges.

The Supreme Court by its very constitution is invested with full original jurisdiction to hear, conduct and pass decisions in all civil suits and such power can only be taken away where special jurisdiction is given to inferior Courts to try exclusively certain classes of cases. The principle of law is that our jurisdiction can only be vested by express words or necessary implication. No doubt the Master has been entrusted by the legislature with the ministerial duty of carrying through all sales of property and in imposing that duty upon the officer in question the legislature has conferred on him the right of considering "any nullities alleged to exist in the proceedings" but there is no clause, no text of law which either expressly or by construction can be regarded as granting to the Master exclusive powers of jurisdiction in cases like the present. The words must be such as deprive the Supreme Court of an inherent right and we see none of that nature. The very fact that if the Master is seized with the alleged nullities, his judgment is final, supplies a strong argument in favour of the retention of jurisdiction by the Supreme Court. The present action is one of such a nature and of such importance that it may well be brought before the Supreme Court. We are therefore clearly of opinion that the Supreme Court has jurisdiction to try the present issues between parties. This being the case, it is not necessary to examine here whether the Master was competent to dispose of the objections submitted to him. Even admitting that he had jurisdiction, we think that the parties themselves have agreed to which of the two Courts the question to be decided should be submitted; on the day fixed for the final sale, Martial the wife did not

urge that the objections entered at the foot of the memorandum of charges should be heard by the Master, as, he alone was competent to dispose of them, but, she consented to a postponement *sine die* on account of an action entered against her before the Supreme Court by Delbor and other defendants.

The action referred to here is the one which is under review and the declaration reproduces the objections which were to be argued before the Master. The consent of Martial the wife and the order of the Master must be taken in their plain and evident meaning, which, in our opinion, is that the parties agreed to postpone the final sale and adjudication until the Supreme Court had pronounced on the merits of the present case. The question of jurisdiction being thus disposed of, without considering whether there is satisfactory evidence to establish that Mrs Martial is creditor of her father, and whether, she was or was not bound to notify her title if any, but, admitting her claim for the present we will now proceed to examine whether the defendants claim is barred by the ten years prescription.

Mrs. Martial became of age in 1868, and admitting that she had a right of action on account of a legal mortgage we have to consider if she can now exercise the same. In the case of *Edwards vs. Martial the wife*, the Court held that under Art. 35 of Ord. No. 15 of 1878, minors who have attained their majority previous to the passing of the Ordinance were bound within two years after its promulgation to exercise any rights they might pretend to have against those who hold under the 10 years or the 20 years or the 30 years prescription and the Court further held that "any rights" included rights of mortgages as well as of ownership. We adopt the interpretation of the Ordinance 15 of 1878 which the Court has laid down in that case. But we were favoured by an additional very able ar-

gument on the law of prescription by the defendant's counsel to the effect that Art. 35 of Ordinance 15 of 1878 could not apply to his client because the provisions of that article can only be pleaded by a party who can say that he has prescribed the ownership of the property which is burdened by a mortgage and that the right to a prescribed property is always derived from one who is *non dominus*, whereas the defendant's father, the granter of the deed from whom the plaintiffs hold their land was the undoubted proprietor of the subject conveyed to them. Now, undoubtedly, the words in which the 35th section of the Ordinance is expressed are not without ambiguity. But though the section limits the rights of the minors and interested persons, we think ourselves bound to put on the section in question the natural and reasonable interpretation which the legislature meant the words to convey. We cannot doubt that the true interpretation of the section is that those who have possessed an immoveable subject for 10, 20 or 30 years under the conditions implied by law for these respective periods of possession have a right against every kind of claim as against all the world unless that claim is exercised within two years after the promulgation of the Ordinance. The ten or twenty years prescription can only be invoked by a *bona fide* purchaser having a just title. If to his just title the purchaser adds a possession of ten years he is in our opinion entitled to invoke the provisions contained in article 35 of Ord. 15 of 1878 as well against a mortgage creditor as against the alleged owner of the property.

Now, plaintiffs bought the land on the 15th of May 1857 and when Mrs. Martial became of age in 1868 they had been in possession for more than ten years. But it was argued that such possession was not of good faith that there was clearly legal bad faith in as much as in the deed of sale it was stated.

" déclare M. Chéron qu'il est actuellement " tuteur de L. G. & Noémie Chéron, qu'il a " eu sous sa tutelle M. Mélidor Chéron, et " Mlle Jeanne A. Chéron, maintenant ma- " jeurs, tous quatre ses enfants, etc., " and that the plaintiffs were by these words warned of the probable existence of a mortgage and therefore cannot plead good faith so far as the prescription of the mortgage was concerned:

We have carefully considered the decision founded on by the defendant's counsel given by the Court of Rouen and reported in Sirey 1877,—2—117 and we observe that in addition to similar words the deed in question contained the phrase " pour faciliter l'accomplissement des formalités des purges légales, etc., " which seems to emphasise the warning to the purchaser that there actually were existing burdens on the subject he was buying. Here the allegation of bad faith rests entirely upon the mere mention in the deeds that Chéron was then guardian of his minor children and we cannot admit that the future possibility of his becoming one day indebted to them in his capacity of guardian and being unable to pay them could necessarily make Delbor at the time of his purchase in 1857 guilty of bad faith. Further he had no direct knowledge of any such claim for it is not shown in any way that any claims did then exist. He was purchasing a small plot of land from a man who had much property at the time. Good faith is always to be estimated at the time the contract was entered into and must always be presumed. In the present case we see no reason adduced in evidence or argument which is sufficient to establish bad faith and we must therefore hold that Delbor and those who bought from him enjoyed the possession of the land in dispute in good faith and with a just title for more than ten years. In short Mrs Martial was bound to exercise any right of action she might claim within ten years of the promulgation of article 35 of

Ord. 15 of 1878, she has not done so and is therefore barred by the effect of that article.

We therefore decree that the " commandements " seizures and proceedings made in view of the sale of the land bought by Delbor from Chéron are null and void and we give the decree with costs.

SUPREME COURT

UNIVERSAL LEGATEE—CLAIM—HOLOGRAPH WILL CONTESTED BY HEIR WITHOUT RESERVE—ONUS PROBANDI—ARTS 1004 & 1006 C. C.—DISTINCTION CREATED THEREBY ABOLISHED—UNIVERSAL LEGATEE HAS NOW THE SEIZINE—ORD. 21 OF 1883—THE ONUS PROBANDI DOES NOT LIE UPON THE HEIR—ACTORI INCUMBIT PROBATIO—THE LEGATEE IS THE ACTOR—ART. 1323 AND FOLLOWING C. C.—NO ENVOI EN POSSESSION NEEDED—ART. 1008 C. C. ABOLISHED BY ORD. 21 OF 1883—PLAINTIFF TO VERIFY THE TESTAMENT FOUNDED UPON BY HIM.

An alleged universal legatee under an holograph testament claimed the quiet possession and enjoyment of a Mosque and its appurtenances.

The defendant, brother and heir of the " de cuius," pleaded, inter alia, that the testament was not true and genuine.

On the question upon whom was the " onus " of establishing the genuineness or non-genuineness of the testament, the Court ruled:

10. *That the distinction formerly existing under arts : 1004 and 1006 of the Code Civil between a universal legatee in presence of heirs having reserved rights and a universal legatee having no such rights, had disappeared by the operation of Ordinance 21 of 1883.*

20. That under art. 9 of the Ordinance a universal legatee who has to deal even with "heritiers reservataires" is dispensed with asking delivery from them, and he now possesses the "seizine" formerly belonging to those heirs under art. 1004 Code Civil.

30. That as it would be going very far to impose upon the heirs with a reserve the "onus" of proving that a contested holograph will was not genuine, by analogy that "onus" could not now be imposed upon the heirs having no reserve, since the universal legatee had been placed on exactly the same footing when in presence of either category of heirs.

40. That in the actual state of the legislation the general rule : *actori incumbit probatio* should obtain, and that the "actor" in cases like the present, was the legatee claiming in virtue of a contested deed under private signatures (Art. 1323 and following Code Civil)

50. That there was no necessity for the plaintiff to obtain an "envoi en possession", art. 1008 of the Code Civil having been implicitly abrogated by art. 9 of Ordinance 21 of 1883.

The plaintiff was consequently ordered to lead in the verification of the holograph testament founded upon by him.

DINA—Plaintiff

versus

SOBDAR—Defendant

Before

His Honor E. J. LECLÉZIO,— Chief Judge

and

His Honor E. C. MAYER—Acting Puisne Judge

W. NEWTON,—Counsel for plaintiff

H. BERTIN,—Attorney for the same

E. GALLET—Counsel for defendant

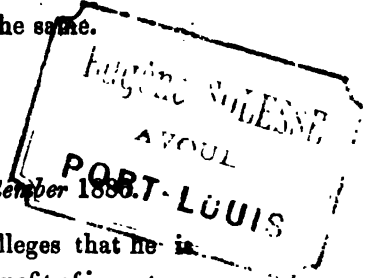
T. NICOLAS—Attorney for the same.

Record No. 23283,

14th September 1886.

In this case the plaintiff alleges that he is the universal legatee under benefit of inventory of the late Mirza Ally Zénélabdine Imam Bacosse Sobdar and is the High Priest of the first Musulman Mosque existing in the Eastern Suburb, and in that capacity is entitled to have the quiet possession and enjoyment of the said Mosque and of all its appurtenances. One of the documents upon which the plaintiff's action is based is the holograph testament of the late Imam Bacosse Sobdar, and the defendant who is the brother of the *de cujus* and as such entitled to claim a share in his succession avers in one of his pleas that this testament is not true and genuine. The question which was argued *in limine* and which we have now to decide is whether it is for the plaintiff to prove that the will is genuine or for the defendant to prove that the will is not genuine. It was also argued that the will tendered being a holograph testament the plaintiff should have been sent into possession by a Judge's order in virtue of Articles 1006 and 1008 of the Civil Code before he could enter the present action or at all events before the defendant can be ordered to prove that the will is not genuine.

The jurisprudence of the Court of Cassation in France appears to be settled in this sense that when a universal legatee is in presence of heirs having no reserved rights in a succession, the obligation to lead in the verification of a holograph will, which is not acknowledged by the heirs, falls on the heirs provided the universal legatee has been sent



into possession in virtue of article 1008. This Court has in the case of *Motet vs. Lalouette* (1877 p. 60) adopted the rule laid down by the Court of Cassation. Marcadé under article 1008, Laurent Vol. 13 § 233 and following and Demolombe, Donations and Test. Vol. 4 § 146 and following criticize the doctrine of the Court of Cassation which is not followed by certain courts of appeal in France, the Court of Caen among others (Vide Caen, S. 1853.2.411.)

It will be remarked that the ruling of the Court of Cassation does not apply to heirs having reserved rights in a succession, they have the seizine (*saisine de droit*) at the death of the testator and the universal legatee is bound to ask from them the delivery of his legacy in virtue of article 1004. The case is different when the universal legatee is in presence of heirs having no reserved rights in the succession, he is seized at the death of the testator and is not bound to ask the delivery from the heirs (art 1006) but if the testament is holograph he must be sent into possession by a Judge's order in virtue of article 1008. The ruling of the Court of Cassation dispensing the universal legatee with the *onus* of proving the genuineness of the will after this formality has been fulfilled, is based upon these considerations that the universal legatee has first the legal seizine (*saisine de droit*) in virtue of article 1006 and secondly the seizine *defacto* (*saisine de fait*) in virtue of the order sending him into possession according to article 1008. The criticisms of Marcadé, Laurent and Demolombe bear principally upon the too great importance attached by the Court of Cassation to the order of *envoi en possession* required by article 1008, which is a mere formality taking place *ex parte* upon the production of a copy of the deed of deposit of the testament. Laurent says :

" Il y a un vice radical dans le raisonnement de la Cour de Cassation, c'est qu'elle

" confond les principes de la saisine avec la
" la foi due aux actes. Pour peu qu'on y réfléchisse on voit qu'il n'y a rien, absolument rien de commun entre la saisine et la
" force probante du testament olographe." If we had to choose between the two french systems we would probably be inclined to adopt the views of the Court of Caen supported by Demolombe and Laurent and other commentators but a very important modification has been made to this part of our Civil Code by our Local Ordinance No 21 of 1883, its article 9 runs as follows " Legatees by whatever
" title are by the death of the testator, or by
" the event which gives effect to the legacy,
" seized of the right to the thing bequeathed,
" in the condition in which it then is together
" with all its necessary dependencies and with
" the right to obtain payment and to prosecute
" all claims resulting from the legacy without
" being obliged to obtain legal delivery. Articles 1004, 1005, 1006, 1011, 1014 and 1016
" of the civil code are repealed in so far as
" they are inconsistent with the present article.

By this new provision a universal legatee who is in presence of heirs having rights reserved by law in a succession (*héritiers réservataires*) is dispensed with asking delivery from those heirs, he has now the seizine which by article 1004 entirely belonged to the heirs. The distinction which existed between heirs having reserved rights and heirs having no reserved rights when in presence of a universal legatee such as it is established by article 1004 and 1006, has now disappeared in consequence of the new enactment, and in both cases the universal legatee is seized of the right to the thing bequeathed without being obliged to obtain legal delivery. Under the French law when a universal legatee is in presence of *héritiers à réserve* he is bound to ask for the delivery of the legacy whether the testament be authentic or holograph (art 1004) ; but when he is

in presence of heirs who have no reserved rights he is not bound to ask for the delivery whether the testament be authentic or holograph (art. 1006); however when the testament is holograph he is bound to ask for an "envoi en possession" from the President of the Tribunal in Chambers (art. 1008) and the Court of Cassation has ruled that having both the seizine of right under article 1006 and the seizine *de facto* under art. 1008 by the "envoi en possession" the universal legatee was in a better position than the heir who had no reserved rights "héritier non réservataire" and that it was for this latter to lead in the verification of the holograph will when he did not acknowledge it. But if the Court of Cassation had been in presence of a law like article 9 of Ordinance 21 of 1883 which gives the seizine as well to the universal legatee in the case contemplated by article 1004 as to the universal legatee under article 1006, we do not think that that Court would have imposed upon the heirs "à réserve" such as the son or the father of the *de enjus*, the obligation to lead in the verification of the contested holograph will.

Having to deal with a law which places on the same footing a universal legatee who is in presence of heirs *à réserve* and a universal legatee who is in presence of heirs having no reserve and which gives to both of them the seizine whether the testament be authentic or holograph, we are of opinion that we would be going very far if we were to impose upon the heirs *à réserve* the onus of proving that a contested holograph will is not genuine, and if we do not impose such an obligation on the heirs *à réserve*, we do not see in virtue of what principle we should impose it on the heir who has no reserve since the new law makes no difference between them with regard to the seizine granted to the universal legatee with whom they have to deal. We consider that it is more logical in the actual state of Our Legislation on this matter

to follow the general rule which is: *actori incumbit probatio*; the real actor is here in our opinion the legatee who invokes the testament which is an act under private signature, as his title, and that title being contested by the defendant (art. 1323 & foll. of the Civil Code) we think that the plaintiff must show that it is genuine. It was argued incidentally that the plaintiff ought at all events to have obtained an "envoi en possession" in virtue of article 1008 which has not been explicitly repealed by art. 9 of Ord. 21 of 1883. The plaintiff stated that he had applied for an order of possession but that the judge in Chambers had refused it on the ground that it was no longer necessary under the new Ordinance. We entirely concur in this decision. It is true that article 1008 is not named in art. 9 of the Ordinance as repealed, but it clearly results from the terms of this article that it (art. 1008) has been implicitly repealed. Art. 9 says that the legatees shall have the right to obtain payment and to prosecute all claims resulting from the legacy without being obliged to obtain legal delivery, and no distinction is made between legacies contained in authentic wills and those contained in holograph wills. Now the order of "envoi en possession" mentioned in article 1008 is a sort of *visa* the object of which is to authorize the universal legatee appointed by a holograph will to take possession of the legacy. In our judicial system, after the will had been, in virtue of article 1007, presented to the Master, who is entrusted by the Organic law of the Supreme Court with the probate of wills and deposited by the Master with a public notary, after he had examined and signed it, the universal legatee applied *ex parte* to the Judge in Chambers for an order of possession and the judge after reading a copy of the deed of deposit issued the order. The original of the testament was never shown to the judge and he had no opportunity to examine it. Such an

order could not be binding upon interested parties who were never called nor heard and it was a mere formality, but this formality already of comparatively little value before the new ordinance, has, in our opinion, become useless in presence of the terms of article 9 of Ord. 21 of 1883. If legatees by whatever title are now seized by the death of the testator and have the right to obtain payment and to prosecute all claims resulting from the legacy without being obliged to obtain legal delivery, we do not see of what use in law the "envoi en possession" could be. But there is more, article 1004 having been repealed as well as article 1006 there is now no difference between the universal legatee who is in presence of heirs having a *réserve* and the universal legatee who is in presence of heirs having no reserve, they have both the seizine which was formerly given to the latter alone by article 1006; and, if this latter was still bound to obtain the "envoi en possession" mentioned in article 1008 as this article refers only to the case of article 1006 it is clear that the legatees mentioned in article 1004 are not bound to ask for the "envoi en possession" and we would arrive at this strange result that universal legatees who have to deal with heirs having no reserve would be obliged to resort to the formality of the "envoi en possession" whilst universal legatees who are in presence of heirs *à réserve* would not be bound to obtain the "envoi en possession." We cannot suppose that the legislature contemplated such an anomaly and we must therefore hold that it intended implicitly to repeal article 1008 as providing for a formality rendered useless by the new enactment contained in article 9 of Ordinance 21 of 1883. If the formality of an "envoi en possession" be still considered as useful in the case of a holograph will, it should at all events be rendered obligatory as well when the universal legatee is in presence of heirs *à réserve* as when he is in presence of heirs having no reserve;

the seizine now existing in both cases—besides if such a formality be re-enacted, it should in our opinion be surrounded with more serious guarantees than those which existed in our judicial system as we have just pointed out. Our decision, upon the whole, is that it is for the plaintiff to lead in the verification of the holograph testament tendered by him.

SUPREME COURT

APPEAL FROM CONVICTION—SUFFICIENT EVIDENCE TO GO TO A JURY—IRRELEVANT EVIDENCE RECEIVED—DECISION NOT AFFECTED—REMARK MADE TO CALL ATTENTION TO A STATE OF THINGS, ADMISSIBLE—OBJECTION MADE TOO LATE ON APPEAL TO ANOTHER QUESTION—APPEAL DISMISSED.

In this case, which was an appeal from a conviction of a District Magistrate, the Court held:

10. *That there was sufficient evidence of all the elements of the offence to go to a jury.*
20. *That when questions are put and answers given on points quite immaterial to the issue, which may be considered as surplusage, and which are introduced not as evidence of a fact, but as preparatory to evidence which is to follow, the erroneous admission of such irrelevant matter cannot affect the decision, if otherwise sound.*
30. *That a remark made by a person to a witness while calling the latter's attention to the bad state of some bags, was receivable as evidence.*
40. *That an answer given by an individual not called as a witness, having been received in the Court below, without any objection from the accused, it was now too late for him to raise the point.*

The appeal was dismissed with costs.

GOPEE,—Appellant

versus

QUEEN,—Respondent

—

Before

His Honor ANDREW MURE,—Puisne Judge

And

His Honor JOHN ROUILLARD,—Puisne Judge

—

W. NEWTON,—Counsel for appellant

H. Bertin,—Attorney for the same.

Hon. L. ROUILLARD,—Counsel for defendant

J. GUIBERT,—Attorney for the same.

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Record No. 534

5th November 1886.

On the second of August last, Gopee was sentenced by the acting District Magistrate of Grand Port to eight months' imprisonment with hard labor for having been found in possession of stolen property without sufficient excuse or justification. It appears from the perusal of the record that, in the early part of April last a certain quantity of guano contained in gunny bags was forwarded from town to Mare d'Albert Station, for the use of the Estate "Gros Bois". It was found when the guano reached the Estate, that a number of bags were slack and flabby, some were only three quarters full. Information was given to the police and on the same day the appellant Gopee was found manuring canes in a field belonging to him with guano, which on being analysed, was found to be of the same nature and quality as the guano contained in the bags tempered with. Of the possession of that guano, no satisfactory explanation as it appears, was given to the Magistrate. From

the sentence of the District Magistrate an appeal was made on several grounds. It was argued in the first instance that there was no evidence of the larceny of guano.

Whilst dealing with this question, it must be borne in mind that Article 40 of the Penal Code on which the sentence is founded was evidently made to meet cases like the present one, where there is no direct evidence of larceny, but where there is ample proof from the surrounding circumstances, that the missing article has been feloniously abstracted. It is in these cases that, if the stolen property is in possession of a third party and that possession is not satisfactorily explained, Article 40 of the Penal Code receives its application.

In the case before us, evidence was given that a certain quantity of bags of a special kind of guano was sent to Mare d'Albert for the use of "Gros Bois" Estate. Witnesses were called to show that guano was missing from the bags when they were delivered over at the station to the carts of the Estate.

The appellant was found by the Police in the very act of guanoing his canes with guano identical with the missing guano. This guano was of a special kind, never sold by the manufacturer to Indians.

The station Master's cart was seen conveying that guano to the appellant's premises. There were also other points of minor importance, which, no doubt, guided the Magistrate's opinion.

The Court is disposed to think, on the examination of the record, that on the facts laid before him, the Magistrate rightly held that the guano found at Gopee's was the proceeds of a larceny. But without going so far, the question before us is whether there was before the Magistrate evidence on which to found a conviction. Being satisfied as to that, we

must hold that the appreciation of that evidence by the Magistrate is not subject to review.

We have next given our careful consideration to a point urged with great force by the appellant's Counsel, namely: that the conviction must be quashed, because the Magistrate improperly admitted hearsay evidence.

The attention of the Court was, with reference to this ground of appeal, drawn to two incidents of the trial which took place before the District Magistrate. In the first instance Mr. Edwin de Robillard, manager of "Gros Bois" Estate was asked by the Counsel for the prosecution if Mr. Volcy de Robillard, the Accountant of the Estate made any statement to him (Edwin de Robillard) with regard to the state in which the bags of guano were when they reached the Estate.

The question was objected to. The record then bears the note: "question allowed, admissibility reserved". Upon which Edwin de Robillard proceeds to say this: Volcy de Robillard stated that the bags were slack and flabby.

Undoubtedly this was hearsay evidence and the Court cannot but express its surprise that the District Magistrate did not at once dispose of a question so elementary and found no other means of getting rid of the difficulty felt by him, but by allowing the question to be put, reserving its admissibility, a proceeding so unusual that the Substitute Procureur General who appeared to support the conviction desired the Court to dispose of the case as if the evidence had been received by the Magistrate and not reserved.

It must be added that after reserving that evidence, the Magistrate eventually rejected it, as explained in his judgment. The learned Counsel for the appellant argued that this

Court could not do otherwise upon finding that the District Magistrate had improperly admitted hearsay evidence, but quash his sentence. Reference was made to two well known decisions of the Supreme Court, Ramroo vs. Reg, 1865 and more particularly, Newton vs. Reg, 1882 in which convictions of a District Court were quashed on the ground that evidence had been improperly received. However, in looking closely into those decisions and the facts on which they were founded, it will be seen that they were extreme cases, in which the Court had no other course left but to apply well known principles of the law of evidence.

In the first of the cases referred to, an incompetent witness was heard, not even on oath.

In the second, a statement by a party injured, made in circumstances which clearly could not be considered as forming part of the "res gestae" was admitted with a view to corroborating the evidence of the facts on which the complaint and conviction were founded. But the question remains open: what must this Court sitting on appeal decide when questions have been put and answers given in points quite immaterial to the issue, which may well be considered as a mere surplusage and which, avowedly were introduced, not as evidence of a fact but as in the present instance as preparatory to evidence which is to follow. In civil and even in criminal cases, questions are often put in order to expedite the hearing of cases, which are not strictly in accordance with the essential rules of evidence. If no objection is taken to these, the Court does not interfere, but if objection is made, it is obvious that the Court must not allow the question to be put. But what, if the rule is disregarded? We have been unable to find any decision on the point. All the cases reported refer to the introduction or

rejection of evidence on important and material facts and which bear directly on the question at issue. It is probable that in the English Courts where the rules of evidence are well understood, questions such as the present one never arise—and it is the fact that after a careful search, we have been unable to find any English case in which a conviction of a lower Court was set aside by the Court of Review on the ground of incompetent evidence having been admitted or rejected.

We are disposed to hold that in deciding as to the fact of evidence improperly admitted, a difference, even in criminal cases, must necessarily be made between evidence bearing on the point at issue which therefore becomes material and must in a greater or less degree carry weight in the mind of the Court, and the questions which not being intended to elicit any evidence may be considered as mere surplusage. However much it is to be regretted if the rules of evidence are not properly understood, it seems to us that evidence which in the very face of it, is futile or useless and cannot have any effect on the issue of innocence or guilt of the accused, cannot, if erroneously introduced (and this, it is to be hoped, will occur but very seldom) affect a decision otherwise sound.

As to the second question put before the Magistrate and allowed by him, there was, as we think, no violation of the law of evidence. —Mr Volcy de Robillard was asked what an Indian named Kistoo had said to him.—This was objected to, and no doubt, if the question and answer stood singly, hearsay evidence would again have been erroneously introduced into the case. But Mr de Robillard answered: That the Indian called his attention to the bags of guano being flabby and badly sewn, but he adds in the same breath that (having evidently examined the bags) he never saw any bags

so badly sewn. Being taken as a whole, that portion of Mr Robillard's evidence is perfectly receivable.

Another point raised by the appellant is that the District Magistrate improperly admitted as evidence a conversation between a constable of Police and one Soobanah whilst Soobanah was not heard as a witness in the case. What took place is simply this: one of the witnesses for the accused named Govinden having stated that he had sold guano to the accused, the Magistrate sent "proprio motu" a constable of Police in company with the accused and Govinden to fetch samples of guano. Govinden took the Constable of Police to the premises of one Soobanah in town. The Constable naturally enough, asked Soobanah if he knew Govinden. Whereupon Soobanah in the hearing of the accused who remained silent said that Govinden had been his, Soobanah's partner but had ceased to be so. The Constable as in duty bound took a sample of the guano which he found on the premises and brought it to the Magistrate.

What Soobanah said to the Constable is obviously no proof of the fact that Govinden had been or was no longer his partner. But what Soobanah said in answer to the harmless question of the Constable appears from the record to have been received without any objection on the part of the appellant's Counsel, it is clearly too late now to raise the question. Another point remains: whether the penalty is excessive? after reading the record, we cannot but consider the offence as very serious, and we do not feel disposed to revise the decision of the Magistrate.

The appeal is dismissed with costs.

SUPREME COURT

CANCELLATION OF SALE.—LATENT DEFECT.—
ART. 1648, C. C.—CASE DISMISSED.—AP-
PEAL.—NO ENQUIRY BY THE MAGISTRATE.
— ALLEGATION OF FRAUD.— JUDGMENT
REVERSED.—COSTS.

An action in cancellation of the sale of a horse had been dismissed by a District Magistrate on an objection taken in limine litis by the vendor, that the plaint had not been entered within that reasonable delay contemplated by law.

The Court considering that the Magistrate had before him certain letters only from which nothing could be gathered except a few dates and that the plaint did not reveal the cause of the lameness of the horse or the term at which the disease supervened, ruled that the Magistrate should have made an enquiry into the matter.

The Court further remarked that the plaintiff alleged that the defendant knowingly and willfully deceived the plaintiff as he well knew the unsound condition of the horse when he sold it to the latter, and that if such a thing were established, a Court of Justice might feel some reluctance to cut off all right of action by the failure to begin a suit a few days earlier than it was actually done.

The judgment, in hoc statu, was reversed and the case remitted to the Magistrate to hear the parties and take such proof as might be necessary and to do therein as might be just.

Costs of appeal to be for plaintiff if successful in the Court below ; otherwise, each party to pay his own costs.

MALLAC,—Appellant

versus

JAMET,—Respondent.

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor E. DIDIER ST.-AMAND,—Acting
Puisne Judge

B. COLIN,—Counsel for appellant
E. HUTEAU,—Attorney for the same.

W. NEWTON,—Counsel for respondent
A. PITOT,—Attorney for the same.

Record No. 870.

11th November 1886.

This is an appeal from a judgment of the District Magistrate of Plaines Wilhems in which the appellant who was the plaintiff in the lower Court prayed from the Court a judgment condemning the respondent to take back a horse sold by him to the former and to pay to appellant the price of the said horse with interest, and one rupee per day as damages from the alleged day of sale for the expense of keeping and feeding the said horse.

When the case was heard before the Magistrate the respondent stated an objection in *limine litis* to the effect that the plaint was not receivable in law not having been entered within that reasonable delay which must be held to be contemplated by law and in support of this produced certain letters. The record then bears that the respondent's agent "pleads and

"moves that the case be dismissed." Mr Colin for the appellant replies and reads "certain letters and the case was then postponed for judgment."

The question we have to decide depends on the interpretation to be given to article 1648 of the Code Civil "l'action résultant des vices rédhibitoires doit être intentée par l'acquéreur dans un bref délai suivant la nature des vices rédhibitoires et l'usage du lieu où la vente a été faite".

The Code did not fix the period of time within which the purchaser must bring his action, but left it to the discretion of the Judge who was to be guided by the nature of the latent fault, and the Custom of the place where the sale was made. The Magistrate in the present case has merely considered certain letters and without any proof of the nature of the "vices rédhibitoires" has decided that the action was brought too long after the date of the day of the sale to permit of its being entertained by him, and has dismissed it with costs. The Court has no doubt that in sales of domestic animals any objection which seeks either to annul the sale or to found the principle *quantum minoris* should be at once stated and should be at the shortest possible space followed up by an action regularly served. In this view of the matter they consider it probable that the judgment of the district Magistrate in this case will turn out to be well founded. In cases of sales of horses and indeed of other domestic animals it is true on the one hand that some faults which are of serious nature may for a time be concealed or do not exhibit themselves immediately and on the other hand in a month or even a fortnight after sale, plenty of time is given for certain deceases to arise, the germs of this even did not exist at the time of sale. And in actions by a purchaser in such cases he must take

upon himself the onerous burden of proving that at the moment of the sale, the animal in question was latently labouring under the disease, which subsequently manifested itself. For these reasons in such cases speedy action is required by our law.

In the present case the plaintiff has serious delays in his procedure to overcome which may ultimately prove fatal to his claim, even if he succeeds on other points. But we have to consider whether the Magistrate's Judgment is *hoc statu* well founded, with reference to the requirement of the article that the plaintiff bringing such an action shall do so "dans un br.f délai suivant la nature des vices redhibitoires". He had merely before him certain letters of the parties from which he could gather nothing but the dates of the transaction of the sale, and the date of the claim made by the plaintiff. There is not a word in these letters regarding the nature of the alleged latent fault, or of the cause of the lameness which had manifested itself. But it may be said that in pronouncing this judgment the Magistrate took to be true all that is alleged in the plaint and yet felt bound to dismiss it without proof. If the plaint had revealed the cause of the lameness and that was well known to be of such a nature that the disease must have supervened after the day of the sale we would not interfere with the judgment so pronounced. But having carefully considered the plaintiff's statement in his plaint we are unable to say what was the nature of the "vice rédhibitoire" or with what disease the animal was specially affected.

Is it possible to hold in these circumstances that the requirement of the article has been fulfilled? The short delay has not been fixed with reference to the nature of the latent fault. We therefore think that the Magistrate should have made an inquiry into that matter and that not having been done his judgment

seems premature. We come more readily to this conclusion, it being alleged in the plaint that the defendant knowingly and wilfully deceived the plaintiff and it was explained that from certain circumstances the respondent knew well the unsound condition of the horse when he sold it. If this be indeed proved, it may be that a Court would feel some reluctance to cut off all right of action by the failure to begin a suit a few days earlier than it was actually done (see Dalloz Verbo "Vices rédhibitoires" No. 1,737). But every matter of this kind is of a such nature that it must hereafter be deliberately considered. Again warning the plaintiff that he has a difficult task before him in consequence of the long time elapsed after he had the horse until the lameness showed itself and the still longer time between the date of the sale and the raising of the action, *we hoc statu* recall the Magistrate's judgment of 24th August last and remit to him to hear parties to take such proof as may be necessary and to do therein as may be just. As to the costs of this appeal we order them to be paid to the plaintiff in the event of his subsequently obtaining judgment against the defendant, but if the action be dismissed we further order that each party should pay his own costs of this appeal.

SUPREME COURT

ACTION IN DAMAGES.—SALE OF GRAM.—BROKER NO POWER TO SELL.—MINOR CONDITIONS NOT SETTLED.—NO ENTRY IN THE BROKER'S CARNET.—NO BORDEREAU SIGNED.—JUDGMENT FOR PLAINTIFF.—BROKER HAD POWER.—ART. 1583, C. C.—SALE GOOD WITHOUT MINOR CONDITIONS SETTLED.—NO ENTRY IN CARNET NECESSARY.—THE

TRANSACTION A VERBAL ONE.—DAMAGES REDUCED TO Rs. 1,500 WITH COSTS.

The plaintiffs claimed Rs. 6,000 as damages for non delivery of 3,000 bags of gram, alleged to have been sold to them by defendant.

The defendant pleaded :

- 1o. *That the broker had no power to sell the gram.*
- 2o. *That there were certain minor conditions which had never been settled.*
- 3o. *That there was no entry of the sale in the broker's carnet.*
- 4o. *That no bordereau establishing the sale had ever been signed by him.*

The Court held :

- 1o. *That the defendant had authorised the broker to sell the gram.*
- 2o. *That the ownership of the gram had been acquired by the plaintiff, the thing to be sold and the price to be paid having been agreed upon, although certain points of details might still remain to be determined (art. 1,583, C. C.).*
- 3o. *That there is in Ord. 11 of 1836 no clause, derogating from the common law, to the effect that transactions by brokers shall not be binding, unless entered in their carnet.*
- 4o. *That the parties contemplated here a verbal sale, not a sale to be completed only by signatures attached to a bordereau.*

The damages suffered were found to be Rs 1,500 and judgment went for plaintiff in that amount with costs.

HAMOOJEE & Co.,—Plaintiffs

versus

ISSOP MAMODE SULLIMAN,—Defendant

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Before

His Honor E. J. LECLÉZIO,—Chief Judge
and

His Honor J. ROUILLARD,—Puisne Judge

—

Hon. G. GUIBERT.—Counsel for Plaintiffs,
E. LEBLANC,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for Defendant,
G. A. RITTER,—Attorney for the same.

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Record No. 23,436.

15th November 1886.

This is an action for Rs. 6,000 as damages for non delivery of 3,000 bags of gram alleged to have been sold by the defendant to the plaintiffs under the following circumstances :

From the evidence led by the plaintiffs it would appear that in the forenoon of the 23rd of February last, Ally Mamode one of the agents in Mauritius of the defendant happened to be at the office of Emile Pascau, a broker ; Henri Lucas, Evonor Maurel, broker, and one Ismaël Hossen Cassim were also present. Some conversation took place on a possible rise in the price of gram, in as much as plaintiff's firm was speculating in view of a rise in the price of that article. A rivalry in trade exists, as it appears, between plaintiffs' and defendant's agents. Ally Ma-

mode warming up in the course of the conversation, commissioned Emile Pascau, then and there to offer to plaintiff 3,000 bags of gram at Rs. 6.50 per bag, delivery to take place on 15th March—payment on delivery. Pascau accordingly went to the office of Plaintiffs, who expressed their readiness to buy at the price offered, but insisted that the date of delivery should be the 5th March and that the gram should be guaranteed as being "non piqué." According to Plaintiffs. Pascau went back to confer with Ally Mamode at his place of business ; Ally Mamode came out to meet Pascau at his carriage. He agreed to the date of delivery being fixed at the 5th March, and, instead of the clause "non piqué" accepted to sell the gram as "not damaged" Ally Mamode according to plaintiff's version of the affair was then so eager to sell, that on parting from Pascau he made use of a rude but characteristic expression which would leave no doubt as to defendant's state of mind.

The plaintiffs aver that they accepted defendant's modification to their proposal. Pascau again called at Ally Mamode's office, to inform him that the bargain was concluded. Ally Mamode was not at home, but, later in the day, he came to Pascau's office and to the latter's deep surprise, declared that he repudiated the bargain. An angry discussion then and there took place in presence of several witnesses between Pascau and Ally Mamode in the course of which the latter declared that Pascau had no authority to sell. It is to be remarked that Pascau had not entered the sale on the "Carnet" or memorandum book which the local Ordinance 11 of 1836, Art 12, requires brokers to keep. Further more, at the time of the last interview between Pascau and Ally Mamode, the bordereaux of sale had not yet been made out, or were only half prepared. Pascau however, notwithstanding the repudiation of the sale by Ally Ma-

mode, sent the "bordereaux" to the latter to be signed; as might be expected, the "bordereaux" were returned without the signature of defendant. On the fifth March the price of gram, having according to the plaintiff's contention, risen to the extent of two rupees, the claim of Rs 6,000 damages is made, as representing the increase in value of the 3000 bags of gram purchased by the plaintiffs on the 23rd February.

It becomes necessary before we consider the main facts at issue between the parties to dispose of an objection by the defendants as to the mode in which the action was entered by the plaintiffs, the latter founding their claim as alleged by defendant on the "bordereaux" which as above stated had been made by Pascau after a formal protest by defendant against the sale.

On referring to the pleadings, however, it appears to us that although the declaration is somewhat wanting in clearness this action is really founded on a sale of gram alleged to have been made verbally through the agency of Pascau on the 23rd February last, and that the "bordereau" is only mentioned as embodying the conditions of sale.

In one part of the plaintiff's declaration indeed the "bordereau" is described as a bill of sale, which is obviously wrong, in as much as it was not signed by the defendant and consequently had no effect, but elsewhere it is made clear that the plaintiff's claim for damages rests on a breach of verbal contract, independently of the "bordereau" or bill of sale by which the contract is evidenced. Altogether, we are of opinion that the declaration though it might have assumed a more definite form expresses with sufficient correctness the nature of the action brought by the plaintiffs. The principle which governs this case is laid down in art. 1583 of the Civil Code "la pro-

"priété est acquise... dès qu'on est convenu de "la chose et du prix" and this rule must be understood to mean that the contract of sale is perfect whenever parties have agreed as to the article sold and the price even when points of detail which have not been mentioned between parties, still remain to be determined. As expressed by Bédaride "des achats "et ventes § 89" "Les parties se trouvent "liées... alors même qu'elles auraient omis, "négligé ou réservé de s'entendre sur les "clauses-conditions, à la condition néanmoins "que ces clauses-conditions purement acci- "dentelles ne puissent et ne doivent exercer "aucune influence sur l'essence du contrat."

This point has its importance, because in the present case it was contended that whilst, according to Pascau's statement he had only authority to sell gram "not damaged" he had inserted in the bordereau a clause to the effect that the bags were to be "bien pleines et en bon état" and another proviso that the gram should be "*de bonne qualité et marchand*" also a stipulation that in default of delivery, defendant would be liable for the difference of price if there was any at the date fixed for the delivery.

We do not think, however, that much can be made of the defendant's argument on this point. If we believe Pascau when he says that he had instructions to sell gram "not damaged" this clearly means that it would be marketable. The clause that the bags should be full and in good condition seems to have been introduced in order to ensure their being of proper weight, and as for the stipulation that the defendant was to be liable for the difference in the value of gram, on failure of delivery, it is but the natural consequence of the contract of sale, if any was made between the parties. It must be remarked at the same time that it is not on those subsidiary points that the discussion

between Pascau and Ally Mamode took place. The main point of contention between them is the date of delivery and the total absence of authority.

It is also clear to us that although Art. 12 of Ord. 11 of 1836 enacts that brokers are to have "Carnets" or Memorandum books in which they have to enter the transactions concluded by them, a sale by a broker remains good although he has not complied with the provisions of the Ordinance above referred to. In that Ordinance there is no clause to the effect that transactions by brokers shall have no effect, unless entered in the "carnet" and the general principles of the law as to contracts remain therefore untouched. It must be observed at the same time, that whilst "carnets" and memorandum books are of great utility when reference has to be made to a transaction made some time previous, the absence of a "Carnet" in the present case can hardly have had any effect on the point arisen between the parties, the difference between them, as to whether authority to sell was given or not, having arisen within few hours of the alleged sale. As for the absence of "bordereau," no doubt there are cases in which it is apparent that parties do not consider the contract about to be entered into by them as complete unless the broker has regularly made his "bordereaux" and these have been duly signed by the parties. In these cases, a mere agreement between parties as to certain points, does not suffice, but here nothing of the sort is shown to have been contemplated by the plaintiffs and defendant nor is it proved that there is any usage of trade compelling brokers to make "bordereaux" in cases similar to the present one and to have them signed by the parties in order that the sale be complete.

After thus disposing of the points of law raised in the course of the trial, the difficulty

which we have to meet lies in the fact that whilst Pascau on the one hand and Ally Mamode on the other, flatly contradict each other as to the authority to sell which Pascau alleges to have received in his second interview with defendant Ally Mamode, where he stood at the carriage, there is on this important point (if we exclude the statement of the coachman, who only speaks to a certain expression used by the defendant and who has not quite satisfied the Court that his testimony can be safely received) no direct evidence but that of Ally Mamode & Pascau, each of them equally interested parties; for, supposing that Pascau is found to have, without authority, made a sale, he must feel himself in great danger of being sued damages by the plaintiffs. In some decisions of the Court of Commerce of Marseilles which were communicated to us, and in another of the Court of Douai, it is laid down that the Courts, availing themselves of the discretionary power given to them by Art. 109 C. Com. last paragraph, are not to allow a broker to give evidence in a Commercial transaction in which he has been engaged as broker, if he is the only witness who can speak as to that transaction. Although an English Court will probably never prevent a witness from being heard when there is against him no prohibition expressly enacted by law, it must be observed that the result would be practically the same, for if there is as to a Commercial agreement no other evidence but the mere statement of the broker uncorroborated by any extraneous circumstance, it would be impossible for a plaintiff to prove his case.

In the present instance however, although on the incident above referred to when certain instructions are alleged to have been given to Pascau, there is no other evidence but that of Pascau and of the defendant, yet there are other circumstances preceding and following that transaction which in the opinion of the

Court throw enough light on the whole case to enable the Court to come to a right appreciation of what really took place between the parties.

It is, in the first instance, clearly apparent to the Court that the plaintiffs and defendant were rival firms, holding different opinions as to the turn which the grain market would take, that the defendant represented by Mamode who believed in a fall in value of that article, showed, as evidenced by several witnesses present in the office of Pascau on the morning of the 23rd of February, great eagerness to sell to his rivals who were operating in view of a rise in the value of grain. Pascau having left Ally Mamode to make the offer of sale to the plaintiff, returns a few moments after to announce the result of his interview with the plaintiffs, and after conferring with Ally Mamode drives back again to the plaintiffs with whom he at once concludes a bargain. Ally Mamode affirms that in the interview which he had with Pascau at the carriage he peremptorily declined the modifications of his offer suggested by the plaintiff and declared the matter to be at an end, yet we find Pascau driving back straight to the plaintiffs and concluding a bargain with them, on the very terms which Ally Mamode has declared to be unacceptable.

- Pascau's action, if we believe the defendant can only be explained in three ways : either he fraudulently betrayed his client, or he misunderstood his instructions, as a third hypothesis he may have knowingly exceeded his mandate on some point believing that he was acting for the real advantage of his client.

The first hypothesis is not admissible, apart from other personal considerations. Pascau had little to gain and much to lose by betraying his client. He must have known that by deceiving the defendant he would lose all hopes of doing business in future not only

with the defendant but with his friends and all those who would side with him ; to Pascau, a young broker, the matter would have been serious indeed.

Could there have been any misunderstanding ? If the point at variance between the plaintiffs and defendant had been of small importance, we might have considered the thing possible, but here, the date of delivery was to the parties a matter of paramount interest, so much so, that in the previous conversation with Pascau at the office of the latter Ally Mamode asserts that having previously mentioned the 15 March as the date of delivery, he corrected himself and instructed Pascau that the date should be made the 5th March.

In order to adopt the hypothesis of a misunderstanding we must hold that, the defendant having said that he considered the matter at a end, his broker understood him to say, that he consented to alter the date of the 15th March into the 5th March and to accept a warranty clause as "bonne qualité" instead of "non piqué". This is hardly admissible.

Then comes the hypothesis that Pascau might have imprudently exceeded his instructions believing that he was at the same time acting in the interest of his client. But then, Pascau's attitude would have been different when Ally Mamode met him in the afternoon, in presence of Henri Lucas, Bouchet and others.

One would have expected Pascau to offer explanations or some kind of apology but on the contrary, we find him, to all appearances, sincerely indignant at the apparent breach of faith of defendant and in perfect rage against him, so much so that his friends had some difficulty in pacifying him. It does not look as if Pascau was acting that scene. He

seemed not prepared for the defendant's disavowal. But if his anger was not feigned, and, if, as we really believe, he could not have misunderstood his client's instructions what must we conclude, if not, that the defendant had ceased in the afternoon of the 23rd February to be of the same mind as he was on the morning of that day.

We hold that there was a sale well and duly made. The defendant must therefore, make good to the plaintiff the difference between the value of gram on the 23rd February and its value on the 5th of March.

It next becomes our duty to protect the defendant against what was clearly a manoeuvre on the part of the plaintiffs to raise fictitiously the price of gram. The sale made on the 5th of March was a transparent farce and the Court will not certainly be guided by it. The market was unsettled on the 5th March, most likely from the effect of the sale advertized and made by Allum and whilst we are informed that at the sale "par concurrence" which was made on the 5th March gram fetched as high a price as Rs 8.50, there is proof that Suleeman Elias, an Arab merchant sold 950 bags of gram to several parties at Rs 6.80 and even less. On looking over the evidence on the question of price, we find that Lagesse bought gram on the day of the sale at Rs 7.80, but Pezzani during the whole of that week bought gram at Rs 6.60. Ibrahim Ismaël sold 500 bags of gram at Rs 6.75 on the 4th of April. Sidick Omar on the day of the sale sold gram at Rs 7.50; Henry Lucas fixes the value of that article on the 5th March at between Rs 7 and Rs 7.20 and considering that one of the qualities of gram which the defendant had agreed to supply was of the kind called Dessy and some what inferior to the other qualities, we think that Rs 7 may be assessed as the fair value of gram such as the one which defendant had undertaken to supply to the plaintiffs.

The defendant must pay to the plaintiff damages at the rate of fifty cents of a rupee per bag, that is to say Rs 1,500 (fifteen hundred rupees) with costs.

SUPREME COURT.

POLICY OF INSURANCE.—AMOUNT THEREOF CLAIMED BY REGISTERED OWNER OF A SHIP.—DEMAND IN INTERVENTION BY A PURCHASER OF HALF OF THE SHIP.—COMPANY RESISTS THE INTERVENTION.—BENEFICIAL INTEREST OF THE THIRD PARTY IN THE SHIP.—NO DISCUSSION BETWEEN A REGISTERED AND A NOT REGISTERED OWNER OF A SHIP.—"L'INTÉRÊT EST LA MESURE DES ACTIONS".—INTERVENTION ALLOWED.

On a claim of Rs. 10,000, amount of a policy of Insurance, being entered against a Marine Insurance Company, a third party asked leave to intervene on the ground that previous to the loss of the ship, he had purchased one half thereof, by a deed under private signatures, from her registered owner.

The registered owner abided by the decision of the Court.

The Company objected to the intervention on the ground:

- 1o. That the law recognizes no other owner or owners of ships, but those whose names have been duly registered.*
- 2o. Because the policy of Insurance had been made in the name of the registered owner alone.*

Held by the Court:

- 1o. That this was not a case of conflicting claims between registered and not registered owners.*

20. *That the intervening party had had a beneficial interest in the lost ship sufficient to entitle him, as against the registered owner, to a share in the proceeds of the policy of Insurance.*

30. *That in our procedure any person whose interest can be affected by the result of law proceedings between other parties can intervene in those proceedings.*

The intervention was allowed and the question of costs reserved.

—
RAFFAUT,—Plaintiff

versus

MAURITIUS MARINE INSURANCE
COMPANY,—Defendants

WIDOW LUCCHEZI,—Intervening party

—
Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor J. ROUILLARD,—Puisne Judge

—
F. MATHEWS,—Counsel for Plaintiff

E. LEBLANC,—Attorney for the same.

• P. L. CHASTELLIER,— Counsel for defendant
J. BOUCHET,—Attorney for the same

The Hon. GUIBERT—Counsel for the inter-
vening party

E. CHAILLET,—Attorney for the same

•
Record No. 23,662.

25th November 1886.
—

Widow Lucchezi both in her own name and as guardian of her minor children, applies to this Court for leave to intervene in an action

brought by one Pierre Raffaut against the Mauritius Marine Insurance Company for recovery of Rs. 10,000, the amount of an insurance effected on the schooner "Jane Bell" of which Pierre Raffaut was the registered owner, and which was wrecked at Rodrigues on or about the 16th of April last. It results from an act under private signatures, the genuineness of which is not disputed, that the late G. Lucchezi in whose rights the applicant stands purchased in August 1885 from Raffaut one half of the schooner "Jane Bell" but the act of the sale was not registered under the Merchant Shipping Act. Pierre Raffaut abides by the decision of the Court, but the Mauritius Marine Insurance Company objects to the intervention of widow Lucchezi on the ground, 10. That the law recognizes no other owner or owners of ships, but those whose names have been duly registered, and in the second place, 20. because the policy of Insurance had been made in the name of Pierre Raffaut alone, the registered owner of the "Jane Bell".

There cannot be any doubt that the law recognizes no owners to a ship but those whose names are entered in the Register kept in pursuance of the Merchant Shipping Act. It is the person so registered who has the management and disposal of the ship and exercises all the rights incidental to ownership, but this is not a case where the Court has to decide upon conflicting claims between registered and non registered owners. The ship has been lost. It no longer exists, and Pierre Raffaut in whose name an insurance on the ship was effected has brought an action on that Policy. Even if widow Lucchezi could not be recognized as part owner in the ship in terms of the Merchant Shipping Act, she has a beneficial interest therein at least sufficient to entitle her, as against Raffaut, to her share in the proceeds of a policy of Insurance effected on the ship.

It is one of the forms of our procedure that any person whose interests can be affected by the result of law proceedings between other parties can intervene in those proceedings. Widow Lucchezi from the circumstances which were explained to us, has clearly an interest in the event of the action brought by Raffaut against the Mauritius Marine Insurance Company.

We shall allow her intervention, reserving the question of costs and also all questions which may arise out of this intervention.

SUPREME COURT

SEIZURE OF A MULE IN POSSESSION OF A DEBTOR.—CLAIMANT ADDUCES ORAL EVIDENCE.—EVIDENCE REJECTED.—APPEAL.—CLAIMANT BOUND TO ESTABLISH HER GROUNDS OF CLAIM.—IN INTERPLEADERS ALL LEGAL MODES OF PROOF ADMISSIBLE.—DECISION REVERSED.—CASE REMITTED TO DISTRICT COURT.—COSTS RESERVED.

A creditor having caused to be seized a Mule found in the apparent possession of his debtor, a third party intervened and claimed the mule as hers.

The District Court refused to the claimant leave to establish by parole evidence that she had bought the mule and had subsequently lent it to the debtor.

On appeal, held by the Court :

10. *That it was competent and indispensable for the claimant to explain how the mule was hers and how it happened to be found in the possession of the debtor.*
20. *That in interpleaders the grounds of the claim may be proved by every mode of proof which is competent by law.*

The Magistrate's decision was set aside and the case remitted to him to be proceeded with according to law.

Costs reserved.

ROOKEEA,—Appellant

versus

JOYPERCASH & ORS.—Respondents

Before

HIS HONOR ANDREW MURE—Puisne Judge

and

HIS HONOR J. ROUILLARD—Puisne Judge

D. JENKINS,—Counsel for Appellant

V. DUCASSE,—Attorney for the same

W. NEWTON,—Counsel for Respondents

F. SIMONET.—Attorney for the same.

Record No. 867.

26th November 1886.

Joypercash having caused to be seized a mule in the apparent possession of one Budree, Rookeea the present appellant claimed it as her own by way of interpleader. In her notice to the usher the grounds of her claim are that the mule was her own as she had bought it sometime before from one Roopeea and that she had lent it to one Nazeer.

The claimant's, and appellant's, Counsel had to prove in support of her case 10. that the mule belonged to her 20. the circumstances under which that mule was found on the premises and in possession of Budree.

In support of the appellant's claim of ownership of the mule, there was produced a

bill of sale which was not signed and therefore had no value, but this document being rejected by the Court and rightly so, he declared that he wished to prove by witnesses the sale of the mule which had conferred the ownership of it on the appellant, in as much as she and her seller were both carriers and therefore traders. The appellant here adduced herself as a witness on proof of that point, when, on an objection raised by Joypercash the respondent who was the seizing creditor, the Court declined to hear her further on the ground that this was not a Commercial transaction.

We regret that the Magistrate took the course of stopping the appellant in the midst of her evidence because it was competent and even indispensable for Rookeea to explain how the mule was hers and how it happened that it was found in possession of Budree. As Rookeea and her seller were alleged to be traders and the mule was alleged to have been sold and bought in the exercise of the trade of these two parties, the duty of the Magistrate was to satisfy himself that Rookeea and Rookeea were carriers and having satisfied himself that this was the case, to admit oral evidence of the sale. But we prefer to put the point to be decided on this principle that in interpleaders, the grounds of the claim may be proved in every way that is competent by law.

Under the rules regulating the practice and proceedings of the District Court it is clear that those on Interpleader, with the relative Schedule, which requires the ground of the claim to be stated, are borrowed from the title in the Code of Civil Procedure on "saisie exécution". The 608th section requires the claimant to intimate the writs to various parties which are to contain a statement of the proofs of property under pain of nullity.

It is important to note that the jurists and

Courts in France admit every kind of proof in cases similar to interpleaders "Carré and Chauveau" put the question (207 bis) "comment satisfait-on à la disposition de l'article 608 qui prescrit d'énoncer les preuves de propriété?" and answer it thus "Il n'est pas nécessaire d'énoncer des titres écrits d'où cette preuve résulte, car, le plus souvent, la propriété des meubles n'est pas fondée sur de pareils titres et c'est pourquoi l'on a remplacé par le mot *preuves* celui de *titres* que contenait le projet de notre article comme l'atteste Mr. Pigeau Com. 1. 2. p. 198".

"Il suffira donc d'énoncer des faits qui rendent vraisemblable ou certaine la propriété qu'on allègue, et ces faits seront le plus souvent des faits de possession, puisque, en fait de meuble, la possession vaut titre.— Ainsi, dit Mr. Thomine Desmazure, 1.2. p. 124, on énoncera des titres des faits ou des qualités qui tendent à établir que le débiteur saisi ne possédait pas les objets revendiqués ou qu'il ne les possédait qu'à titre précaire et qu'ils appartiennent au réclamant".

To the same effect is a judgment of the Court of Besançon reported in Dalloz Périodique (Vol. 52, 2,233) in which it is said: "La propriété de ces sortes de biens n'est souvent pas fondée sur des titres et que la loi prescrit seulement l'énonciation des preuves que le revendiquant invoque, c'est-à-dire des faits de possession des qualités ou des droits qui rendent vraisemblable ou justifient la propriété qu'on allègue et dont on doit être admis à prouver l'existence; qu'il résulte de la discussion de l'Art. 608 que la Section du tribunal ayant proposé de substituer aux mots *énonciation de titres*, ceux-ci: *énonciation de preuves*, ce changement fut adopté, d'où l'on doit conclure que l'on a entendu admettre tous les genres de preuves". The same principle may be

deduced from a judgment of the Court of Limoges, 17th December 1839 (S.V. 40. 2. 246).

Agreeing that in the analogous case of a claim for a corporeal moveable by way of interpleader, the property of such a subject may be proved by every kind of proof, we see no other alternative but to recall the Magistrate's present decision and remit the case to him to be proceeded with according to law. In doing so we cannot but point out that the evidence of such a claim as that made by the appellant should be examined not only with care but with severity. We further think that the costs of this appeal should abide the result of the case.

SUPREME COURT

ATTACHMENT.—VALIDITY CLAIMED.—DEBTOR OBJECTS.—HE IS CREDITOR OF A LIQUID CLAIM.—HIS ALLEGED CREDITOR'S DEBT IS NOT LIQUID AND UNCERTAIN.—NO ATTACHMENT POSSIBLE.—COURT OVERRULES ONE OBJECTION.—CLAIM UNCERTAIN NOT YET VALUED.—ART. 559, PRO. CIV.—JUDGE'S ORDER EX PARTE.—AFFIDAVIT.—NO EVIDENCE IN SUPPORT OF PLAINTIFF'S CLAIM.—NO VALUATION POSSIBLE.—ATTACHMENT SET ASIDE.—COSTS.

An attachment had been lodged by an alleged creditor in his own hands and in that of third parties against moneys due to his debtor.

On the demand in validity of the said attachment, the debtor denied the alleged debt and objected to the validity prayed for on the following grounds:

10. Because the debtor of a liquid claim has no right to attach that money in his hands

to secure a disputed claim which is not liquid.

20. Because, at all events, if the debt claimed for which the attachment is lodged is not certain, the attachment must be set aside.

The Court overruled the first objection on the authority of Chauveau, Vol. 4, Para. 1925, Art. 558, Proc. Civ.

On the second point, considering that the claim not being certain, there should have been a valuation made thereof as required by Art. 559, Proc. Civ.; that there had been here only a Judge's order obtained ex parte upon an affidavit; that there was no documentary evidence in support of a primâ facie case; that all the averments of plaintiff's claim being not only not liquid but uncertain, it could not be valued.

The attachment was therefore annulled and the application in validity dismissed with costs.

MAMOOJEE.—Plaintiff.

versus

CASSIM.—Defendant.

Before

His Honor E. J. LECLÉZIO.—Chief Judge.

and

His Honor J. ROUILLARD.—Puisne Judge

G. GUIBERT,—Counsel for plaintiff.

E. GANACHAUD,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for defendant.

G. A. RITTER,—Attorney for the same

Record No. 23,749.

26th November 1886.

The plaintiff has lodged an attachment in the hands of himself and of other parties to guarantee the payment of the sum of Rs. 88,000 alleged to be due to him by the defendant for the balance of an account between them. A principal action was entered by the plaintiff to obtain a decree of the Court against the defendant for that amount but the defendant in his plea denied the correctness of the account, besides he had a few days previous entered a declaration against the plaintiff in which he avers that he is the creditor of the plaintiff for the balance of the account to be settled between them and asks judgment against him for Rs. 21,000; both actions cannot be proceeded with until the month of February next, a commission having been sent to India for the examination of certain witnesses.

The question of validity of the attachment lodged by Mamoojee against Cassim having been referred from Chambers a motion is now made to the effect that the proceedings in attachment be stayed until the decision of the main action.

This motion is objected to by Cassim who says that the claim which he has against the plaintiff and other parties, and which has been attached is a privilege of vendor due by Mamoojee himself for Rs. 25,701 and by the brothers Torana for Rs. 6,780.25, whereas Mamoojee's claim in virtue of which the attachment was lodged is not only contested but is neither certain nor liquid. The first point which was argued for the defendant is that the debtor of a liquid claim has no right to attach that money in his hand to secure the payment of a disputed claim which is not liquid. The second point taken on behalf of the defendant is that, at all events, if the

claim for which the attachment is lodged is not certain, the attachment must be annulled. We have examined the authorities quoted upon the first point and we are very clearly of opinion that Chauveau in Vol. 4 para. 1,925 under Art. 558 refutes in a satisfactory manner the theory according to which the debtor of a liquid claim cannot attach in his hands sums due by him to secure the payment of an unliquidated claim due to him.

Chauveau says, "Concluons que le créancier qui se trouve en même temps débiteur du même individu peut saisir arrêter entre ses propres mains les sommes qu'il doit pour sûreté de celles qui lui sont dûes, soit *de plano* si la créance est liquide, soit, si elle ne l'est pas après l'avoir fait évaluer."

This leads us to the consideration of the second point. In this case the attachment was lodged in virtue of a Judge's order obtained ex parte upon an affidavit containing the averment that the balance of account claimed was due, this order according to the plaintiff's pretension is equivalent to the valuation by article 559 Code Pr. Civ. : "Si la créance pour laquelle on demande la permission de saisir — arrêter n'est pas liquide, l'évaluation provisoire en sera faite par le Juge." It is clear however that in order to make a valuation there must be a certain basis, in other words, although the claim is not liquid it should at all events be certain to some extent. The whole jurisprudence of the French Courts is in that sense; see Dalloz Vo. saisie-arrêt No. 49 and following; and it has been several times held that a claim, the existence of which depends upon an account to be established or upon a liquidation to be made, being uncertain, could not, so long as the account or liquidation is not settled, serve as the basis of an attachment and further that if a valuation has been made by a Judge when the claim was not certain, the attach-

ment should in the proceedings in validity be annulled, see Cass. § 71, 1.197 " Une saisie-arrêt ne peut être valablement formée pour une créance qui n'est pas certaine et dont l'existence dépend du résultat d'un compte à faire, Dijon 74-2. 210. " Une saisie-arrêt ne peut être valablement formée, même avec l'autorisation du Président du tribunal pour une créance résultant d'un compte à établir et de vérifications à faire " and the authorities quoted in note to this arrêt—see also Cass. § 76.1.39.

We have carefully examined the accounts and affidavits put in evidence and we do not find in them sufficient elements enabling us to declare that any part of the plaintiff's claim is certain; there is no documentary evidence to support a " prima facie case " all the plaintiff's allegations are denied and the defendant prefers a counter claim. It is quite impossible to say at present in whose favor the balance will be struck after the computation of the accounts between the parties.

Under these circumstances we are of opinion that the plaintiff's claim, being not only not liquid but uncertain, it could not be valued and no permission could be given under Art. 559 Pr. Cir. to lodge an attachment to secure its payment. We must therefore annul the attachment and dismiss the application in validity with costs.

SUPREME COURT

ACTION IN CANCELLATION OF SALE.—FRAUD. MOTION FOR AMENDMENT OF THE DECLARATION.—"SERVITUDE DE PÈRE DE FAMILLE"—MOTION RESISTED.—THE AMENDMENT A NEW COUNT—NO DEFECT OR ERROR MERELY.—A NEW AND SEPARATE ACTION INTRODUCED.—DEFENDANTS POSITION WILL BE CHANGED.—THE TWO ISSUES DIFFERENT

AND INCONSISTENT.—PROCESS OF INVESTIGATION ALSO DIFFERENT.—RULES FOR AMENDMENT IN EXISTENCE IN ENGLAND.—A NEW ACTION ADDED TO THE EXISTING SUIT.—AMENDMENT REFUSED WITH COSTS.

A declaration had been filed in which two defendants were sued because the one had made to the other a sale of an Estate, in fraud, as alleged, of the rights of the plaintiffs.

The plaintiffs proposed to amend the above declaration by alleging that the vendor had constructed on the Estate certain works for conveying water to an adjoining Estate (now the property of plaintiffs, formerly that of the vendor) and had thereby created in favor of that second Estate a servitude de père de famille which should be maintained. The Court, considering :

- 1o. That the proposed amendment is a new Count and contains new conclusions based on a different ground of action altogether.*
- 2o. That it is not a defect or error which is sought to be amended, but a new and separate action which is based on a different medium of averment, and has a conclusion different from that of the existing suit.*
- 3o. That if the plaintiffs succeed in the present claim, the defence must necessarily be changed.*
- 4o. That the enquiries, under the amendment, would be entirely of a different nature and these two actions appear inconsistent with one another and would require a different process of investigation.*
- 5o. That even under the new Rules now in existence in England, enlarging, as they do, the right of amendment, no case seems to exist in which an amendment has been allowed so that an entirely new action has been added to the existing suit.*

Refused with costs, the amendment prayed for.

—
HENRI VALLET,—Plaintiffs

versus

BOULLÉ & ANOTHER,—Defendants

—
Before

His Honor E. J. LECHEZIO,—Chief Judge

and

His Honor A. MURE,—Puisne Judge

—
E. GALLET,—Counsel for plaintiffs

E. GANACHAUD,—Attorney for the same

Hon. GUTHRIE, Hon. BOUILLARD and W.

NEWTON,—Counsel for Defendants.

F. ROBERT, V. BOULLÉ and L. DE ST.-PERN—
Attorneys for the same

—
Record No. 23,598.

30th November 1886.

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This is an application referred from Chambers to amend a declaration in which the plaintiffs sue Aristide Boullé and Léonce François Boullé on the ground that a fraudulent sale took place on the 3rd June 1886 of the Estate St.-Sauveur, by the one to the other of these defendants and concluding that the Court should find the said sale of St.-Sauveur to be null and void and prejudicial to the plaintiffs and made in fraud of the rights and claims of the plaintiffs. It is explained in regard to the alleged fraud that the defendant Aristide Boullé was the owner of the two Estates "Belle Isle" and "St.-

Sauveur" which are contiguous. That "Belle Isle" was mortgaged in favor of the plaintiffs for a sum of thirty two thousand rupees lent to the defendant Aristide Boullé and that he being unable to fulfil his obligations under the mortgage, the Estate "Belle Isle" was seized and sold for a sum considerably below that which Aristide Boullé owed to them under the mortgage, so that they remained the creditors of Aristide Boullé for the balance of their debt. It is also explained that on the day of the sale before the Master, the 3rd June 1886, when "Belle Isle" was awarded to the plaintiffs, the defendant Aristide Boullé by a deed under private signatures sold to François Léonce Boullé the property of "St. Sauveur" and the share of water belonging to it. It is alleged that this sale is irregular, null and void and made in fraud of the plaintiffs' rights.

It is now proposed to amend the above declaration by alleging that Aristide Boullé when proprietor of both the Estates constructed certain works for conveying the waters of "St.-Sauveur" to "Belle Isle" and has created a "servitude de père de famille" which ought to be maintained and the plaintiffs also propose a new and subsidiary conclusion to the effect that such a servitude should be maintained and continued. It is true that the Court has the power of amending all defects and errors in any proceedings in civil cases and all such amendments may be made with or without costs as may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be made. Undoubtedly the powers conferred by this section are very wide and cover any defect or error at any time and at any stage of the cause, which may be necessary for determining the real question in controversy, and the Court should always be anxious to allow such amendments as would

settle the real question between the parties. It is evident however that each case should be dealt with on its own merits, and the Court has been wisely entrusted with a discretion to admit an amendment or not as it might think proper.

In the present instance there is a clear and distinct case of fraud stated against both defendants and if the plaintiffs succeed in the present action, the sale made by the one defendant to the other will be nullified, and the seller Aristide Boullé who has not lodged defences to the action and left default would remain proprietor of the land. On the other hand the proposed amendment is a new count and new conclusions based on a different ground of action altogether. It is not a defect or error in the present action which is sought to be amended but a new and separate action which is based on a different medium of averment and has a conclusion altogether different from that of the existing suit. It is further to be noticed that if the plaintiffs succeed in the present claim the defendants must necessarily be changed and one of them would have no interest to defend the case arising out of the proposed amendment and the defendant who would alone come forward must be that one who remained the owner of the property. Again the enquiries which would result from the action if it were amended, would be entirely of a different nature, the one affecting the character of the defendants and the right to the ownership of the property, the other claiming a servitude right upon properties which formerly belonged to one of them and which would be good against any proprietor into whose hand the Estate might come. These actions appear to be inconsistent one with the other and would require different process of investigation in order to decide them. Even under the new rules which exist in England for some years

back and which give far wider powers of amendment than those we are now acting under, we have found no case in which an amendment has been allowed so that an entirely new action has been added to the existing suit.

Our rule of Court is borrowed from the Common Law Procedure Act of England, in which the right of amendment is much more restricted. We cannot suppose that the plaintiffs when they raised their present action intended to prefer a claim of servitude of aqueduct. Indeed it was admitted that by an oversight that claim was not inserted in the declaration, it cannot therefore be said that the alleged right of servitude constituted, when the action was raised, any part of the real question in controversy between the parties. The question is what did the plaintiffs intend to do when they raised the present suit? Their only idea was to annul the said alleged fraudulent sale and as to that any amendments may be made because that was the real question in controversy on the face of the declaration. But it would be carrying the principle too far to allow a new issue of a totally different nature from the existing suit to be raised with a new conclusion, and we therefore refuse the present application with costs.

SUPREME COURT

LICITATION.—MORTGAGE CLAIM.—INTEREST AT 8 o/o.—INTEREST AT 9 o/o.—AMBIGUOUS CLAUSE IN MEMORANDUM OF CHARGES.—ART. 1602, CODE CIVIL.—MASTER'S DECISION REVERSED.

An immoveable property sold before the Master by licitation was burdened with a vendor's privilege bearing interest at 8 o/o per annum.

By the 3rd clause of the Memorandum of charges the purchaser was bound to fulfill towards the respective creditors holding mortgages the clauses and conditions of the said mortgages, and was to enjoy the terms and delays granted by the said mortgage creditors to the colicitants.

By the 5th clause the purchaser was to pay his purchase price at 9 o/o per annum.

The Master had ruled that the purchasers (the present appellants) should pay interest at 9 o/o on the above mortgage claim secured by a vendor's privilege.

Held by the Court :

- 1o. *That clause 5, relative to the interest at 9 o/o applied only to the portion of the sale price which was not covered by a mortgage.*
- 2o. *That the scheme of making the purchaser pay 1 o/o interest over and above the 8 o/o payable on that claim was an after thought.*
- 3o. *That, at all events, the memorandum of charges leaves it doubtful whether the interest payable by the purchaser on a portion of his debt shall be payable at 8 o/o or at 9 o/o, and in terms of Art. 1602 of the Code Civil "tout pacte obscur ou ambigu s'interprète contre le vendeur".*

The Master's decision was reversed with costs.

HAJEE CASSIM MAMOOJEE & ORS,—

Appellants

versus

AFFEJEE CASSIM & ORS.—Respondents.

Before

His Honor J. ROUILLARD.—Puisne Judge

and

His Honor E. DIDIER ST AMAND,—Acting
Puisne Judge

Hon. GUIBERT,—Counsel for Appellants
E. GANACHAUD,—Attorney for the same

P. L. CHASTELLIER,—Counsel for Respondents
G. A. RITTER.—Attorney for the same.

Record No. 23,763.

3rd December 1886.

On the 1st July 1886 an Immoveable property in town was sold by Licitation before the Master to the appellants for a sum of Rs. 105,380 (rupees.) The property was burdened with a vendor's privilege held by Mr. Antony Colin and bearing interest at 8 o/o per annum.

Article 3rd of the memorandum of Charges runs as follows: "the purchaser shall be bound to fulfil towards the respective creditors holding mortgages the clauses and conditions of the said mortgages and shall enjoy for the payment of his claims, the terms and delays granted by the said mortgage creditors to the colicitants."

It was further stated (art, 5) that the purchaser should pay his purchase money at the rate of nine per centum per annum according to the judgment of attribution of price by the Master, upon the warrants of payments to be delivered by him and that with regard to the mortgaged creditors they would be paid at the dates stipulated between them and the colicitants. The attribution of price having been made by the Master, Mr. Colin's claim was

collocated for its full amount, namely Rs. 49,560.

The remainder of the sale price was attributed to the collicants in proportion to the shares held by them and in as much as Mr. Colin's mortgage bore interest at 8 o/o per annum, the Master ordered that the purchasers who are the present appellants should pay interest at the rate of one per cent per annum on the sum of Rs. 49560 the amount of Mr. Colin's claim, for the time which the said claim had still to run. From the Master's decision on the last point an appeal has been made.

After weighing with due care the arguments urged on both sides, we think that the appellant's objection must be upheld.

The Master no doubt founded his decision on clause 5 of the memorandum of charges which lays down in general terms that the purchaser shall pay interest at 9 o/o on his sale price. But by Article 3 the attention of the purchaser is drawn to the mortgage existing on the Immoveable property. By article 5 the purchaser is again referred to the mortgage and its conditions. The purchaser on examining the deed must have seen that the privileged claim of Mr. Colin bore interest at 8 o/o and yet in the memorandum of charges, there is no mention made of the extra 1 o/o which the collicants claim as their due, nor of the manner in which that interest will be paid. When the memorandum of charges mentioned interest at 9 o/o as payable on the sale price of the property, whilst at the same time the purchaser was referred to a mortgage at 8 o/o, would it have been unreasonable on the part of the purchaser to have supposed that the clause relative to interest at 9 o/o applied only to the portion of the sale price which was not covered by mortgage? We have further to remark that the terms of the collocation as to this item of

interest at one per cent are quite arbitrary. In principle, the sale price of an immoveable property sold at the Bar of the Master's Court is paid on the "ordre" being closed on the attribution of price settled, unless a stipulation to the contrary occurs in the memorandum of charges. Here we have on one side, a sum representing the difference between Mr Colin's privileged claim and the total sale price made payable at once to the collicants, and on the other side, Mr Colin's claim, which, according to the memorandum of charges is to be paid at a distant date, but what of that item of interest at 1 o/o? Why should it be amalgamated with the interest at 8 o/o payable to Mr Colin, and payment thereof continued until the date when Mr Colin's claims will become exigible. On this point the memorandum of charges is silent.

For the above reasons we have come to the opinion that the scheme of making the purchaser pay 1 o/o interest over and above 8 o/o payable on Mr. Colin's claim, is an after thought. At all events the memorandum of charges leaves it doubtful whether the interest payable by the purchaser on a portion of his debt shall be at 8 o/o or at 9 o/o, and, in terms of Article 1,602 of the Civil Code: "tout pacte obscur ou ambigu s'interprète contre le vendeur". The Master's decision is therefore reversed with costs.

SUPREME COURT

NATURAL CHILD.—DEMAND IN ACKNOWLEDGMENT.—SHARE IN THE SUCCESSION.—PETITION TO THE JUDGE OF SEYCHELLES.—NO DATE TO THE PETITION.—SIGNATURE OF DE CUJUS.—INITIALS OF OFFICER OF CIVIL STATUS.—ACKNOWLEDGMENT TO BE MADE BY FATHER IN ACT OF BIRTH OR BEFORE A PUBLIC OFFICER.—NO SUCH ACK-

NO WLEDGMENT IN THE PRESENT CASE.—NO PROOF WHEN THE ALLEGED FATHER'S NAME WAS AFFIXED.—INITIALS OF THE CIVIL STATUS OFFICER CANNOT GIVE AUTHENTICITY TO DOCUMENT AND MAKE IT AN ACT OF CIVIL STATUS.—CASE DISMISSED.

The plaintiff asked the Court to decree that her minor son was the duly acknowledged child of a certain man, and was as such, entitled to 3/4 of the Estate and succession by his natural father.

The plaintiff founded upon a Petition of hers to the District Judge of Seychelles asking leave to declare her child, she having neglected to do so within the legal delays. The Petition was signed by her and the signature of the alleged father is also attached to the document.

There was no date to the Petition except that of 1875 and at the bottom thereof appear initials which are alleged to be those of the District clerk, acting also as officer of the Civil Status, and the syllable Nov., which is supposed to mean November.

It was contended by plaintiff that the Petition signed as above was a legal acknowledgment of the child by his alleged natural father.

The Court considered :

10. *That the acknowledgment of a natural child must be made either in his act of birth, the father personally appearing to declare the fact, or in an authentic deed.*
20. *That in the present case there is no act either made by an officer of the Civil Status, nor any deed drawn by any other competent public officer, such as a notary.*
30. *That there was no proof when and under what circumstances the name of the alleged father was affixed to the paper.*

40. *That the syllable Nov. and the initials supposed to be those of the Civil Status Officer, could not constitute an authentication of the document so as to make it become an act of the Civil Status.*

The action was dismissed with costs.

—
LOIZEAU,—Plaintiff

versus

DE CHERMONT & wife & ors—Defendants

—
Before

His Honor A. MURE—Puisne Judge

And

His Honor J. ROUILLARD,—Puisne Judge

—
HON. GUIBERT,—Counsel for plaintiff
E. LAURENT,—Attorney for the same

E. GALLET, Counsel for defendants
H. BERTIN,—Attorney for the same.

—
Record No. 23,350.

15th December 1886.

—
In this action the plaintiff Marie Emilie Loizeau suing on behalf of her minor son George Aristide Dupuy, concludes that the Court should decree that the said minor is the duly acknowledged child of the late Aristide Dupuy and the said plaintiff. 20. That the officer of the Civil Status at Seychelles shall be bound to inscribe in his registers the birth as at 1st August 1873 of the said minor as the natural son duly acknowledged of the said late Aristide Dupuy and the plaintiff, 30. that the said minor is entitled to three fourths of

the Estate and succession of the said late Aristide Dupuy and lastly that the universal legacy made by the latter to the defendants should be reduced to the fourth part of his Estate and succession. From the declaration and documents in process we are informed that on 21st August 1873 the plaintiff gave birth to her said minor son at Seychelles and that his natural father was the late Aristide Dupuy, that the time allowed by law for the declaration of the birth of that child having expired the following letter was addressed to the then District Judge of Seychelles. " Port " Victoria 1875, Mr le Juge de District. Mahé " Seychelles, Monsieur, je viens vous exposer " que le 21 Août 1873 je suis accouchée d'un " fils auquel j'ai donné le nom de Georges " Aristide, ne l'ayant pas déclaré dans les " délais accordés par la loi en ayant été em- " pêchée par diverses causes majeures, je me " soumettrai à l'amende que vous voudrez " bien m'imposer, si vous voulez m'autoriser " à me présenter à l'officier de l'état Civil. " Mon fils est l'enfant naturel de Mr Aris- " tide Dupuy qui le reconnaît en signant avec " moi la dite requête, j'ai l'honneur d'être " Monsieur votre très humble servante, Emilie Loizeau, Ade. Dupuy.

This letter contains no date except that of 1875 and in the left hand corner at the bottom there are three initials said to be those of Mr Rennards followed by other letters which are said to be " Nov " meaning November. This letter which is styled a Petition is said to have been handed by plaintiff herself to the District Judge in October 1875 and was by the latter delivered to R. M. Rennards to be by him forwarded to the Procureur General of Mauritius for his conclusions. Mr. Rennards at that date held the position of District Clerk of Seychelles and in that capacity was also the officer of the civil status of the District. It is alleged that he mislaid the paper which he refound only on 10th

September 1877 and forwarded shortly after to the Procureur General. It is then alleged that the petition quoted above is good and valid and is a legal acknowledgment of the said George Aristide as the natural child of Aristide Dupuy and the plaintiff. Dupuy himself died at Seychelles on the 16th March 1877 leaving the defendants as his universal legatees.

The defendants deny all the facts alleged in the declaration and especially that the minor plaintiff is the son of the deceased Aristide Dupuy.

It was argued on behalf of the plaintiff that she was in possession of a document which entitled her to obtain a judgment that the birth of the said minor should be properly registered and that the want of the prescribed formalities does not infer a nullity, a strong effort was also made to assimilate the above letter or petition to an act of the Civil Status.

By the 33rd section of the Civil Status Ordinance (17 of 1871) whenever the birth of a natural child is declared, every officer of the Civil status is forbidden to mention in the act of birth the name of the father, unless he consents to such mention either by appearing and signing the act, or appending his mark thereto if he cannot sign either personally or by deputy appointed by an authentic deed to sign for him. This clause of the Ordinance seems to be an echo and a reenactment of article 334 of the Civil Code which enacts as follows: " La reconnaissance d'un enfant " naturel sera faite par un acte authentique, " lorsqu'elle ne l'aura pas été dans son acte de " naissance."

The position of the plaintiff is an unfortunate one, and her effort to indicate the position of her son must excite the sympathy of every generous mind. But the law clearly lays down that the acknowledgment of a

natural child must be made either in his act of birth, the father personally appearing to declare the fact or in an authentic deed, that is to say by a deed drawn up by a competent public officer with the requisite solemnities. We are aware that in France the number of cases in which an acknowledgment would be admitted as validly made is considerable. Thus such an acknowledgment may be received by a Notary and the fact drawn up in a regular notarial deed, by a Justice of Peace, assisted by the Registrar, in a legal procedure, in which the acknowledgment would naturally be made; by a declaration made by the father in the contract of marriage of his child, and also in other cases to which we were referred. But in the present case there is no act either made by an officer of the Civil Status, nor any deed drawn up by any other competent public officer, such as a Notary. The plaintiff simply produces a document written by herself in 1875, and bearing also at the end of the writing the name of Ade. Dupuy. But there is no proof when that name was placed on the paper and there is nothing to negative the supposition that it may have been written on a blank sheet of paper and the rest of the writing subsequently superimposed or it may have been obtained by surprise from him, or he may have appended his name simply to please the plaintiff, well knowing that no legal consequence could follow from that concession to her feelings. He died two years after the alleged date of the deed and his feelings do not seem to have been much engaged in favor of the plaintiff or her son, as his testament, which in law is held to be the latest act of his life, does not, so far as appears, contain the least reference to his alleged son, or his mother, the leading plaintiff.

The Court had a long argument to the effect that the initials supposed to be those of Mr. Rennards and the syllable "Nov" which was used as an abbreviation for November

constituted an authentication of the letter and that it thereby became an act of the Civil status.

We have no hesitation in rejecting this contention. Even if the contention about the authentication was admissible, no court could hold that the mere mention of the month without specifying day and year could be considered as a date.

It is conceived that the law requires a solemn authentic deed to obviate the various possibilities of error, some of which have been stated above.

For these reasons we cannot sustain the title of plaintiff to proceed to the proof she desires and we think she has laid no foundation for the various conclusions which she seeks to obtain from the Court. We therefore dismiss this declaration with costs.

SUPREME COURT

NULLITY OF A NOTARIAL DEED.—WANT OF CONSIDERATION.—CERTAIN FACTS IN THE DECLARATION.—FACTS ALTOGETHER DIFFERENT IN THE NOTICE.—COURT REFUSES TO ALLOW PROOF, HOC STATU, OF THE FACTS IN THE NOTICE.—NEW PROCEDURE NECESSARY.—COSTS.

The plaintiff prayed the Court to declare that a notarial deed executed by her in favour of defendant was null and void for want of consideration.

The facts, as related in the declaration, were that the plaintiff had signed the deed, because the defendant had undertaken to pay a certain sum to certain third parties and he had failed to do so.

In her notice of facts, however, the plaintiff

asked leave to prove a series of facts altogether different from those in the declaration.

The Court refused, in hoc statu leave to plaintiff to prove the facts in her said notice and ordered the cause to the Roll for further procedure next term.

Costs of the incident to defendant.

—
SEEREEA,—Plaintiff
versus
MAMODE IBRAHIM,—Defendant

—
Before

His Honor A. MURK,—Puisne Judge

and

His Honor J. ROUILLARD,—Puisne Judge

H. HEWETSON,—Counsel for plaintiff.

H. BERTIN,—Attorney for the same.

H. GALÉA,—Counsel for defendant

W. EDWARDS,—Attorney for the same

Record No. 23,332.

15th December 1886.

The plaintiff in her pleadings prays this Court to declare that a deed of mortgage drawn up by Mr Notary Planel in favor of defendant for the sum of Rs. 756 is null and void, for want of consideration.

Although the deed above mentioned purports to have been made in order to secure a debt owing by the plaintiff to defendant for balance of account, the true facts of the case

are, as alleged by the plaintiff, that Seereea had consented to mortgage her property to the amount stated, in consideration of an undertaking by defendant to pay a composition of twenty five per cent to certain creditors of one Ibrahim Moglia, but that the defendant had not fulfilled his agreement.

The defendant in his personal answers admitted readily enough that the mortgage had been given in order to secure payment to be made by him to the creditors of Moglia adding however that he had partially carried out his agreement.

The defendant having apparently waived his right of opposing the introduction of evidence contrary to the terms of a written document made by the parties to the cause, it seems at first that the only question before the court, was whether the defendant has really by paying Moglia's creditors carried out his agreement and whether the sums alleged to have been paid by him to Moglia's creditors have been reimbursed to him. But on turning to the notice setting forth the facts which the plaintiff asks leave to prove, we find that she intends to adduce oral evidence to prove that she signed the alleged deed in order to guarantee the payment of goods to be thereafter sold by defendant to plaintiff, which goods were never sold or delivered.

This fact being in direct contradiction to the averments contained in the declaration, the Court cannot, *hoc statu*, allow proof to be adduced to prove it.

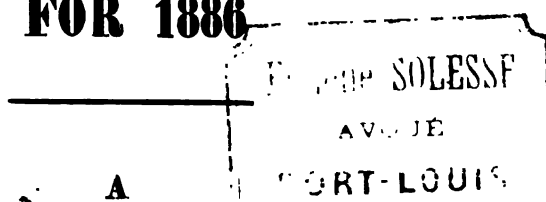
We therefore at present refuse the proof as asked by the plaintiff in her notice of facts and order the case to the roll for further procedure next term.

Costs of this incident to the defendant.

—
End of the year 1886.

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